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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 127

UNIVERSAL BATTERY COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 4, 1929

CERTIORARI GRANTED OCTOBER 14, 1929

(34,258)

(34,258)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 127

UNIVERSAL BATTERY COMPANY, PETITIONER,

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THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 11, 1929

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[fol. 1]

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 127

UNIVERSAL BATTERY COMPANY, Petitioner,

vs.

THE UNITED STATES, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The above petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims entered herein on December 3, 1928, dismissing the petitioner's petition. The petitioner's motion for a new trial seasonably made was overruled on March 11, 1929.

Question Involved

Were the storage batteries sold by the petitioner automobile "parts or accessories" within the purview of section 900 of the Revenue Acts of 1918 and 1921, and the regulations of the Commissioner of Internal Revenue issued pursuant thereto?

The Court below decided the question adversely to the petitioner, dismissing its petition to recover the amount paid as manufacturers excise taxes on such batteries.

Statutes Involved

The Revenue Act of 1918 (c. 18, 40 Stat. 1057) and the Revenue Act of 1921 (c. 136, 42 Stat. 227) contain identical provisions with respect to the question involved in this case and are as follows:

[fol. 2] "Section 900. On and after February 1, 1919, [1918 Act] ["January 1, 1922," 1921 Act] there shall be

levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following per cent of the price for which so sold or leased:

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or the sale thereof) three per centum.

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, five per centum.

"(3) Tires, inner tubes, parts or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), five per centum."

Regulations 47 promulgated by the Commissioner of Internal Revenue, in pursuance of the authority granted by Congress, provided in part as follows:

"Art. 14. * * * Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a 'part' or 'accessory.'"

* * * * * * *

"Art. 15. * * * any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as component part of such vehicle."

* * * * * * *

[fol. 3] "Articles, however, which ordinarily would be classed as commercial commodities, become parts when,

because of their design or construction, they are primarily adapted for use as component parts of such vehicles."

"Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as such a component part."

* * * * * * *

"Art. 16. * * * any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation."

* * * * * * *

"Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as 'parts' or 'accessories.'"

Statement

The facts in this case are fully set out in the Special Findings of Fact (R. 17-21) made by the Court below. In brief they are:

The petitioner is a corporation organized under the laws of Illinois. It is, and has been since 1913, manufacturing and selling storage batteries and storage battery parts. During the period from March 3, 1919, to October 30, 1923, the petitioner paid to the respondent manufacturers excise taxes, penalties and interest in the sum of $27,872.61, upon the sale of storage batteries under section 900, subdivision (3), of the Revenue Acts of 1918 and 1921. The Commissioner of Internal Revenue, on May 15, 1924, denied a refund claim for this amount with interest. The petitioner brought action in the Court of Claims on October 3, 1924, for the refund claimed except for $2,566.31, admittedly barred by the statute of limitations. (R. 17-21.)

The batteries sold by petitioner, during the period in question, were of the same type and kind as had been used, [fol. 4] long before the advent of the automobile, in in-

numerable mechanical devices, where a readily accessable flow of electric current is required. Prior and subsequent to the employment of such batteries in the automobile they were used in signal apparatus, stationary gasoline engines, motor boats, tractors, lighting plants, airplanes, mining cars, railway switches, wireless, telephones, telegraph, radios, fire alarms, door bells, electroplating, etc. (R. 19-20).

A technical description of the composition of the batteries manufactured by the petitioner can be found in the Special Finding of the court below (R. 19).

The batteries manufactured by the petitioner reached the consumer through battery distributors, jobbers, radio dealers, garage men and accessory dealers. The petitioner could not know to what use its batteries would be put when sold by it. The petitioner cannot tell what percentage of its batteries are used for any particular purpose (R. 20, Par. IX).

No automobile required petitioner's batteries as standard equipment. Any one of the several types of batteries manufactured by the petitioner could be adapted for use in some make of automobile. None of the batteries were made for use in any particular automobile unless the purchaser specifically requested it. Some arrangements of cells might limit the petitioner's batteries to some automobiles but would not limit them for the other uses (R. 20, Par. X).

The terminals on a battery determine the purpose for which the battery may be used. The petitioner did not manufacture such terminals. Ninety-nine per cent of its product left its factory without any terminals. The petitioner did not know what sort of terminals were going on its batteries after they were sold (R. 20, Par. XI). It does not appear that the petitioner's batteries were especially designed or primarily adapted for use on any of the vehicles designated in the taxing statute.

Reasons for Granting the Writ

1. One hundred and seven suits involving $2,691,993.42, are pending in the Court of Claims alone on the sole question of whether articles taxed are "parts or accessories" of automotive vehicles.

2. The decisions of the Court of Claims already rendered on like questions are confusing, difficult, if not impossible,

of reconciliation and do not appear to be applying uniform tests of principle.

[fol. 5] 3. The Supreme Court has not construed the Sections of the Revenue Acts of 1918, 1921, or 1924 under which these taxes were levied. No substantially equivalent cases have been decided here since Magone vs. Wiederer, 159 U. S. 555, in 1894.

4. The decision of the United States District Court for the Eastern District of Pennsylvania in Philadelphia Storage Battery Co. v. Lederer, 21 Fed. 2d 320, is in conflict with the Court of Claims decision in the instant case. The government has refused to appeal this decision to a Circuit Court.

5. As the result of this situation actions are being contested in the Court of Claims and probably in other Courts which actions could be concluded by confessions of judgment, or by voluntary dismissal, if the parties were afforded by this court an authoritative and clear standard upon which to judge the merits.

6. In the instant case the Court of Claims decided that the term "parts or accessories" of certain automotive vehicles includes a device not found to be specially designed for use in such vehicles, not found to be primarily adapted for use in such vehicles, but found to be a commercial commodity ordinarily and customarily sold for many general uses other than in automotive vehicles.

7. The sole authority assigned by the Court below is its own decision in Cole Storage Battery Co., 65 Ct. Cls. 164. The determinative facts in that case are so obviously absent in this that error is apparent.

8. It is believed that the decision of the Court of Claims is in conflict with the principles laid down by this court in Magone vs. Wiederer, 159 U. S. 555; Magone vs. Heller, 150 U. S. 70, and Worthington vs. Robbins, 139 U. S. 337.

Wherefore it is respectfully submitted that this petition should be granted.

George Maurice Morris, 815 Fifteenth Street N. W., Washington, D. C. Of Counsel: KixMiller, Baar & Morris.

[fol. 1] IN COURT OF CLAIMS

D-785

UNIVERSAL BATTERY COMPANY

vs.

THE UNITED STATES

1. PETITION—Filed October 3, 1924

To the Honorable Judges of the United States Court of Claims:

1. Your petitioner, Universal Battery Company, by Harry C. Kinne, its attorney, respectfully represents that it is a corporation organized and doing business under the laws of the State of Illinois with principal offices in the City of Chicago, County of Cook, and State of Illinois.

2. Your petitioner further represents that Section 900 of the Revenue Act of 1918 provides as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

"(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in [fol. 2] connection therewith or with the sale thereof), except tractors, 5 per centum;

"(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

Section 1309 of said Revenue Act provides as follows:

"That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and

regulations for the enforcement of the provisions of this Act."

3. Your petitioner further represents that the material corresponding provisions of the Revenue Act of 1921 and the Regulations of the Commissioner of Internal Revenue are identical, for the purpose of this cause, with the provisions of the Revenue Act of 1918 herein set forth with the exception of the effective date which in respect to the Act of 1921 is January 1, 1922.

4. Your petitioner further represents that thereafter the Commissioner of Internal Revenue did promulgate, and the Secretary of the Treasury did approve, the following regulations, the same being what is known as Regulations Number 47, Articles 1, 14, 15, and 16 wherein the effective date of said act is designated and an automobile part or accessory is defined as follows: (We have set forth herein only such portions of said regulations as are material to this cause.)

"Article 1. Effective date.—The tax is imposed on all articles sold or leased by the manufacturer, producer, or importer on or after February 25, 1919, even though manufactured, produced, or imported before that date."

[fol. 3] "Article 14. Tires, inner tubes, parts, and accessories sold to manufacturers.—The words 'tires, inner tubes, parts or accessories' shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as 'tires, inner tubes, parts, or accessories,' and shall not be understood to embrace raw materials used in the manufacture of such articles. Unvulcanized sheet rubber, liquid rubber vulcanizing cement, and friction fabrics are considered raw materials and are exempt from tax. Any article which has reached a state of manufacture wherein it is in itself a component part or accessory and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer is subject to tax as a 'part or accessory.' * * *"

"Article 15. Definition of parts.—A 'part' for an automobile truck, automobile wagon, other automobile, or

motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, and which is primarily adapted only for use as a component part of such vehicle. The term includes bodies, wheels, engines, springs, axles, radiators, etc. When sold separately a side car and a so-called trailer or 'semi-trailer' so designed that a portion of the load or the weight thereof is carried or borne by the tractor or 'semi-tractor,' are taxable as 'parts.' Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not 'parts' within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use [fol. 4] as component parts of such vehicles. Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as such a component part. * * *"

"Article 16. Definitions of accessories.—An 'accessory for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation. The term 'accessories' includes, for example, automobile tops, back and side curtains, horns, speedometers, self-starters, spot lights, shock absorbers, tire pumps, and pressure gauges. Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motorcycles are not subject to tax as 'parts or accessories.' Thus a wrench or other tool of a kind ordinarily sold in hardware stores for general purposes is not subject to tax when sold separately, but if incorporated in an automobile tool kit, is taxable as part of the complete kit. A wrench or other tool of special design or construction primarily adapted for use in connection with automobiles is

taxable. If any doubt exists as to the special adaptability of any article, the fact of its sale by the manufacturer to be used with an automobile, or to an automobile accessories dealer, would determine its taxability. Robes, goggles and lunch kits are not subject to tax. Asbestos brake band linings, generator tubing, and radiator hose are not subject to tax unless sold in prepared sizes, lengths, shapes, or with such fittings as make them adapted for use only on or in connection with automobiles. Parts or accessories for automobile trucks, automobile wagons, other automobiles [fol. 5] or motorcycles primarily adapted for use on or in connection therewith when sold for any other purpose are not taxable provided the purchaser files with his order a statement that such parts or accessories are to be used on or in connection with another article of commerce not enumerated or included in subdivisions (1), (2) or (3) of Section 900. * * *"

5. Your petitioner further represents that Section 1316 of the Revenue Act of 1921 amending Section 3220 of the United States Revised Statutes provides as follows:

"The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; * * *, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this section."

6. Your petitioner further represents that it is now and has been for more than five (5) years last past, engaged in the manufacture and sale of storage batteries and that it has paid, involuntarily, the manufacturer's sales tax on all of the batteries so manufactured and sold by it during the term as stated in the claim for refund hereinafter set forth.

7. Your petitioner further represents that on January 15, 1924, it filed its claim for refund of said taxes, including interest, in the sum of Thirty-four Thousand Two Hundred Eighty-two Dollars and Fourteen Cents ($34,282.14), a

[fol. 6] copy of which claim for refund is hereto attached, marked Exhibit "A" and made a part hereof. A portion of said claim, to wit, Twenty-seven Thousand Eight Hundred Forty-one Dollars and Thirty-five Cents ($27,841.35) represents taxes paid by your petitioner on sales of completed storage batteries. (See total of Column 3, Exhibit "A.") Three Thousand Four Hundred Three Dollars and Sixty-two Cents ($3,403.62) of said claim represents interest claimed by petitioner on Twenty-six Thousand Eight Hundred Nine Dollars and Eighty-two Cents ($26,809.82), an amount refunded to your petitioner for taxes and penalties paid on battery parts sold separately by your petitioner. (See Exhibit "A," Column 4, plus penalties and interest.) The balance of said claim represents interest claimed by petitioner on taxes paid by it on completed storage batteries, pursuant to the 1918 and 1921 Revenue Acts. Petitioner now claims interest on said taxes paid on completed storage batteries, pursuant to the 1924 Revenue Act hereinafter set forth, from the date of such payments to the date of final allowance by this court.

8. Your petitioner further represents that on April 5, 1924, said entire claim for refund was rejected by the Honorable Commissioner of Internal Revenue.

9. Your petitioner further represents that it is now the sole owner of said claim for refund and that said claim has never been assigned to any other person whomsoever.

10. Your petitioner further represents that said batteries so manufactured and sold by it are not now, and never were "primarily adapted" for use only in automobiles, as provided in Section 900, (1), (2), or (3) of said Revenue Acts of 1918 and 1921; that on the contrary said storage bat-
[fol. 7] teries are now, and were always, used for the following, as well as many other, purposes:

For radios, for farm or cottage lighting plants, for propelling railway mail and baggage trucks, for propelling motor boats, in connection with stationary engines, tractor engines, marine engines, for lighting railway coaches, for lighting and starting gasoline railway coaches, in connection with door bells, telephones and telegraphs.

11. Your petitioner further represents that by reason of the facts herein set forth the storage batteries, so manufactured by it, were and are commercial commodities and were not, and are not now, "primarily adapted only" for use in automobiles; that they have not reached, and none of them ever did reach, such a stage of manufacture that they are, or were, in themselves component parts of automobiles as provided in said Revenue Act and Regulations.

12. Your petitioner, therefore, states that it is justly entitled to the amount herein claimed from the United States, after allowing all just credits and set-offs.

13. Your petitioner further represents that it has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government and that it believes the facts as herein set forth are true.

14. Section 1019 of the Revenue Act of 1924 provides as follows:

"Upon the allowance of a credit or refund of any internal revenue tax erroneously or illegally assessed or collected, or of any penalty collected without authority, or of [fol. 8] any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, penalty, or sum was paid to the date of the allowance of the refund, or in case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment, then to the date of the assessment of that amount. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

15. Your petitioner further represents that the above-mentioned sum of Twenty-six Thousand Eight Hundred Nine and 82/100 Dollars ($26,809.82) (see Exhibit "A," Column 4, plus penalties and interest), represents the sales tax, penalties and interest illegally and erroneously col-

lected by the Collector of Internal Revenue of the United States from petitioner on battery parts manufactured separately and sold by it during the years of 1919 to 1922, in the amounts and on the dates as set forth in Column 4 in said Exhibit "A," plus penalties and interest, for which total sum a claim for refund was filed by petitioner, and allowed by the Commissioner of Internal Revenue on or about July 19, 1922, and afterwards repaid to petitioner.

16. Your petitioner further represents that Section 1324 of the Revenue Act of 1921 provides as follows:

(a) "That upon the allowance of a claim for the refund of or credit for, internal revenue taxes paid, interest shall be allowed and paid upon the total amount of such refund or credit at the rate of one-half of 1 per centum per month to the date of such allowance, as follows: (1) if such amount was paid under a specific protest setting forth in detail the [fol. 9] basis of and reasons for such protest, from the time when such tax was paid, or (2) if such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, or (3) if no protest was made and the tax was not paid pursuant to an additional assessment, from six months after the date of filing of such claim for refund or credit. The term 'additional assessment' as used in this section means a further assessment for a tax of the same character previously paid in part."

17. Your petitioner further represents that an additional assessment of excise taxes in the sum of approximately Thirty-one Dollars and Twenty-six Cents ($31.26), same being a further tax of the same character previously paid in part, was made against your petitioner for the month of November, 1919, pursuant to notice, and paid by your petitioner on or about August 16, 1920.

18. Your petitioner claims interest in the said sum of Three Thousand Forty-two Dollars and Ninety-nine Cents ($3,042.99), being interest, after crediting the United States with Three Hundred Sixty Dollars and Sixty-three Cents ($360.63), interest allowed and paid to petitioner at the time of said refund, on that part of said sum of Twenty-six Thousand Eight Hundred Nine Dollars and Eighty-two

Cents ($26,809.82), which was paid prior to the date of the payment of the additional assessment, from the date of the payment of said additional assessment to the date of the allowance of claim, and on that part of the Twenty-six Thousand Eight Hundred Nine Dollars and Eighty-two Cents ($26,809.82) paid after the payment of the additional assessment from the date of payment to the date of the allowance of the claim.

[fol. 10] 19. Your petitioner therefore prays that the above claim for interest in the sum of Three Thousand Forty-two Dollars and Ninety-nine Cents ($3,042.99) on said taxes already refunded and the above claim for taxes paid by it on completed storage batteries in the sum of Twenty-seven Thousand Eight Hundred Forty-one Dollars and Thirty-five Cents ($27,841.35) with interest thereon, pursuant to Section 1019 of the 1924 Revenue Act, may be allowed against the United States by this honorable court; and that such other orders may be entered herein as may be just and equitable.

Universal Battery Co., Louis C. Maury, President.

Duly sworn to by Louis C. Maury. Jurat omitted in printing.

[fol. 11] EXHIBIT "A" TO PETITION

Claim for Abatement of Tax Assessed, Credit Against Outstanding Assessments, Refund of Taxes Illegally Collected, Refund of Amounts Paid for Stamps Used in Error or Excess

STATE OF ILLINOIS,
County of Cook, ss:

Universal Battery Company, Chicago, Illinois, care of K. D. Holland, 1006-139 N. Clark St., Chicago, Ill.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

From: February, 1919,
To: September, 1923.

1. Business in which engaged, batteries and parts.
2. Character of assessment or tax, excise tax. (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased, $—.
4. Reduction of Tax Liability requested (Income and Profits Tax), $—.
5. Amount to be abated, $—.
6. Amount to be refunded (or such greater amount as is legally refundable), $34,282.14.
7. Dates of payment (see Collector's receipts or indorsements of canceled checks), $—. (If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed, Chicago.
9. District in which unpaid assessment appears, none.
10. Amount of overpayment claimed as credit, none.

[fol. 12] 11. Unpaid assessment against which credit is asked; period from —— —, to ——, $—.

Deponent verily believes that this application should be allowed for the following reasons:

That $27,841.35 of the amount indicated above represents taxes paid on batteries for the period indicated above and is claimed in refund for the reason that the batteries manufactured by claimant are exempt from the tax imposed by Section 900, Subdivision 3, Revenue Acts of 1918 and 1921 in accordance with rulings of the Commissioner of Internal Revenue with reference to automobile parts and accessories. Said batteries manufactured by it are commercial commodities not designed or manufactured with some peculiar characteristic making them primarily adaptable for use on automobiles. The attached Exhibit "A" sets forth the amount of tax paid by months. The balance of the excise tax paid by claimant was paid on battery parts as indicated on Exhibit "A" and was refunded to claimant under claim No. 253659 ST-R-466.

The amount indicated above also includes the total interest due in the sum of $6,409.53 computed from the date of the payment of the additional assessment in the amount of $31.26 paid on August 16, 1920, as evidenced by photostat copy of receipt attached hereto and marked Exhibit 1.

Claimant contends that there is additional interest due on refund paid on ST-R-466 and that the interest on battery payments is properly computed (Exhibit "A") for the rea-

son that Section 1324 of the Revenue Act of 1921 provides among other things as follows:

"That upon the allowance of a claim for refund or credit for internal revenue taxes paid, interest shall be allowed and paid on the total amount of such refund or credit at the rate of one-half of one per cent (1%) per month to the date of such allowance as follows:

"(1) If such amount was paid under a specific protest setting forth the basis of, and reasons for, such protest from the time when such tax was paid, or

[fol. 13] "(2) If such amount was not paid under protest but pursuant to an additional assessment, from the time such additional assessment was paid, * * *

"The term 'additional assessment' as used in this section, means a further assessment for a tax of the same character previously paid in part."

On August 16, 1920 (see Exhibit 1), claimant paid an additional assessment as a penalty for delinquency in paying tax to cover the November, 1919, period.

The above partially quoted Section 1324 of the Revenue Act of 1921, contemplates that taxpayers shall receive interest upon the total amount of such refund from the date of the payment of the additional assessment August 16, 1920, to April 8, 1923, the date of the allowance of claim No. 253659.

Claimant claims:

(a) Interest in the sum of $2,442.83 (column 8, line 1, Exhibit "A" on the total amount of $15,395.98 (column 5, line 1, Exhibit "A") paid prior to August 16, 1920 (the date of payment of additional assessment), computed from said date to April 8, 1923, the date of the allowance of claim No. 253659 covering battery parts.

(b) Interest in the total sum of $2,845.94 (column 8, line 20, Exhibit "A") computed on each subsequent payment from August 16, 1920 (date of additional assessment), to the date of the allowance of claim No. 253659 (April 8, 1923).

(c) Interest in the total sum of $642.21 computed on $14,166.34 (column 3, line 20, Exhibit "A") (total tax paid

on batteries prior to January 1, 1922), from April 8, 1923 (date of allowance of claim No. 253659, covering battery parts), to January 10, 1924 (date of preparation of this claim).

(d) Interest in the total sum of $859.18 (column 8, line 41, Exhibit "A") computed on monthly payments of taxes on batteries from the date of each payment between January 1922, and September, 1923 (see column 2, lines 2 to 42, Exhibit "A"), to January 10, 1924 (date of preparation of this claim).

[fol. 14] Each payment made subsequent to the date of the payment of the additional assessment was made under and in accordance with notice and demand covering the assessment which was paid August 16, 1920, under threat of the imposition of the penalty should subsequent payments not be made by the last day of the month following the month in which sales were made.

Credit is given for interest allowed on claim No. 253659 for refund from October 8, 1922, to April 8, 1923, as set forth in Exhibit "A" and amounting to $360.63. The amount of the claim also includes the sum of $31.25 penalties paid on August 16, 1920.

There are attached photostat copies of receipts, Exhibits 2 to 20, inclusive, evidencing payment of taxes on sales of batteries for the period from March, 1922, to September, 1923, inclusive. The receipts evidencing payment of taxes for the months of January and February, 1922, are now in your possession attached to claim No. 253659.

Claimant contends that there should also be included in the total amount refunded interest on the total amount claimed as refund of taxes on batteries computed for the period from January 10, 1924, to the date of the allowance of the claim.

(Signed) Universal Battery Co., by K. D. Holland, Agent.

Sworn to and subscribed before me this 15th day of January, 1924. Marian McLaughlin, Notary Public. (Seal.)

(Here follows side folio page 15)

[fol 15]

Period for which tax was paid Prior to	Date paid Prior to	Tax paid on batteries	Tax paid on parts	Total t paid
Aug. 16-20	Aug. 16-20	$6,208.60	$9,187.38	$15,395
Nov. 1919	Aug. 16-20	.....	.....	31
Aug. 1920	Sept. 30-20	396.50	1,005.20	1,401
Sept. "	Oct. 30-20	352.50	1,074.14	1,426
Oct. "	Nov. 30-20	387.62	926.62	1,314
Nov. "	Dec. 30-20	516.48	952.01	1,468
Dec. "	Jan. 30-21	313.21	962.76	1,275
Jan., 1921	Feb. 28-21	159.89	559.10	718
Feb. "	Mar. 30-21	340.81	983.41	1,324
Mar. "	Apr. 30-21	847.47	1,329.57	2,177
Apr. "	May 30-21	492.30	1,192.79	1,685
May "	June 30-21	518.93	1,076.48	1,595
June "	July 30-21	526.38	1,031.89	1,558
July "	Aug. 30-21	507.08	952.92	1,460
Aug. "	Sept. 30-21	615.59	1,241.75	1,857
Sept. "	Oct. 30-21	617.08	1,283.45	1,900
Oct. "	Nov. 30-21	644.02	1,280.56	1,924
Nov. "	Dec. 30-21	422.09	920.36	1,343
Dec. "	Jan. 30-22	298.94	849.43	1,148
		$14,166.34	$26,809.82	$41,007
Jan. 1922	Feb. 28-22	454.78	.....	454
Feb. "	Mar. 31-22	[illegible]	[illegible]	[illegible]

FOLD OUT IS TOO LARGE TO BE FILMED

[fol. 16] II. General Traverse—Filed Dec. 3, 1924

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Argument and Submission

On February 23, 1928, this case was argued and submitted on merits by Mr. Harry C. Kinne, for plaintiff, and by Mr. R. C. Williamson, for defendant.

[fol. 17] IV. **Special Findings of Fact, Conclusion of Law—Filed December 3, 1928**

This case having been heard by the Court of Claims the court, upon the evidence and the report of a commissioner makes the following

Special Findings of Fact

I

The plaintiff is a corporation duly incorporated under the laws of the State of Illinois with its principal place of business in Chicago, in the State of Illinois, and is now and has been since 1913 engaged in the manufacture of storage batteries and storage battery parts.

II

By various payments beginning March 30, 1919, and ending October 30, 1923, plaintiff paid the United States Government manufacturer's excise taxes, penalties, and interest in the sum of $54,682.43, under section 900, subdivision (3) of the revenue acts of 1918 and 1921 on completed storage batteries and battery parts sold separately. On or about July 19th, 1923, plaintiff obtained a refund in the sum of $26,809.82, being that portion of the above amount

which it had paid as excise taxes on battery parts sold separately, leaving the amount of $27,872.61. Of this sum, $2,566.31, paid prior to four years preceding January 15th, 1924, is barred by the statute of limitations, leaving the sum of $25,306.30. Prior to August 16, 1920, the date of the payment of the above assessment, plaintiff had paid the sum of $9,187.38 as taxes on the gross sales of battery parts.

III

On August 16, 1920, plaintiff paid the sum of $31.26 assessed against it by the Treasury Department as penalties for the late payment of, and in addition to, the five per cent gross sales tax for the month of November, 1919.

[fol. 18] IV

The following is a statement of the dates and amounts of payments of taxes on completed storage batteries and storage-battery parts by plaintiff:

Period for which paid	Date paid	Date receipt issued	Tax paid on batteries	Tax paid on parts	Total tax paid
March, 1919	Mar. 30, 1919	June 7, 1919	$680.42	$102.68	$783.10
April, 1919	Apr. 30, 1919	June 17, 1919	402.25	423.85	826.10
May, 1919	May 30, 1919	July 9, 1919	346.68	480.47	827.15
June, 1919	June 30, 1919	Aug. 6, 1919	122.81	414.79	537.60
July, 1919	July 30, 1919	Sept. 6, 1919	90.56	493.72	584.28
August, 1919	Aug. 30, 1919	Oct. 8, 1919	229.92	467.55	697.47
September, 1919	Sept. 30, 1919	Nov. 12, 1919	77.87	487.74	565.41
October, 1919	Oct. 30, 1919	Dec. 4, 1919	207.20	608.17	815.37
November, 1919	Nov. 30, 1919	Jan. 21, 1920	147.66	477.59	625.25
December, 1919	Dec. 30, 1919	Jan. 26, 1920	161.14	475.23	636.37
			$2,566.31	$4,431.79	$6,998.10
January, 1920	Jan. 30, 1920	(1)	204.67	603.00	807.67
February, 1920	Feb. 29, 1920	(1)	130.65	608.39	739.04
March, 1920	Mar. 30, 1920	(1)	808.92	765.73	1,574.65
April, 1920	Apr. 30, 1920	June 12, 1920	819.58	749.00	1,568.62
May, 1920	May 30, 1920	July 7, 1920	732.86	829.76	1,562.62
June, 1920	June 30, 1920	Aug. 16, 1920	628.51	438.08	1,066.59
July, 1920	July 30, 1920	Sept. 4, 1920	417.06	761.63	1,178.69
	Aug. 16, 1920	.....	(Assessment for penalties paid)		
			$6,208.60	$9,187.38	$15,395.98

[1] No receipts issued by the Government for these 3 months were produced in evidence.

Period for which paid	Date paid	Date receipt issued	Tax paid on batteries	Tax paid on parts	Total tax paid
August, 1920	Sept. 30, 1920	Oct. 8, 1920	396.50	1,005.20	1,401.70
September, 1920	Oct. 30, 1920	Nov. 6, 1920	352.50	1,074.14	1,426.64
October, 1920	Nov. 30, 1920	Dec. 14, 1920	387.62	926.62	1,314.24
November, 1920	Dec. 30, 1920	Jan. 10, 1921	516.48	952.01	1,468.49
December, 1920	Jan. 30, 1921	Feb. 16, 1921	313.21	962.76	1,275.97
January, 1921	Feb. 28, 1921	Mar. 10, 1921	159.89	559.10	718.99
February, 1921	Mar. 30, 1921	Apr. 7, 1921	340.81	983.41	1,324.22
March, 1921	Apr. 30, 1921	May 5, 1921	847.47	1,329.57	2,177.04
April, 1921	May 30, 1921	June 15, 1921	492.30	1,192.79	1,685.09
May, 1921	June 30, 1921	July 13, 1921	518.93	1,076.48	1,595.46
June, 1921	July 30, 1921	Aug. 11, 1921	526.38	1,031.89	1,558.27
July, 1921	Aug. 30, 1921	Sept. 3, 1921	507.08	952.92	1,460.00
August, 1921	Sept. 30, 1921	Oct. 4, 1921	616.59	1,241.75	1,857.34
September, 1921	Oct. 30, 1921	Oct. 27, 1921	617.08	1,283.45	1,900.53
October, 1921	Nov. 30, 1921	Dec. 3, 1921	644.02	1,280.56	1,924.58
November, 1921	Dec. 30, 1921	Jan. 4, 1922	422.09	920.36	1,343.25
December, 1921	Jan. 30, 1922	Jan. 30, 1922	298.94	849.43	1,148.37
			$14,166.34	$26,809.82	$40,976.16
	Aug. 16, 1920	.....	31.26	.....	31.26
			$14,197.60	.....	$41,007.16
January, 1922	Feb. 28, 1922	Mar. 1, 1922	454.78	.....	454.78
February, 1922	Mar. 31, 1922	Apr. 1, 1922	427.37	.....	427.37

March, 1922	Apr. 27, 1922	Apr. 28, 1922	768.17	.....	768.17
April, 1922	May 29, 1922	June 3, 1922	923.82	.....	923.82
May, 1922	June 30, 1922	July 10, 1922	862.90	.....	862.90
June, 1922	July 28, 1922	Aug. 2, 1922	680.26	.....	680.26
July, 1922	Aug. 29, 1922	Sept. 8, 1922	601.93	.....	601.93
August, 1922	Sept. 30, 1922	Oct. 4, 1922	679.41	.....	679.41
September, 1922	Oct. 30, 1922	Nov. 9, 1922	782.00	.....	782.00
October, 1922	Nov. 29, 1922	Dec. 7, 1922	734.89	.....	734.89
November, 1922	Dec. 29, 1922	Jan. 4, 1923	618.85	.....	618.85
December, 1922	Jan. 29, 1923	Feb. 1, 1923	496.74	.....	496.74
January, 1923	Feb. 28, 1923	Mar. 7, 1923	656.71	.....	656.71
February, 1923	Mar. 29, 1923	Apr. 6, 1923	483.70	.....	483.70
March, 1923	Apr. 28, 1923	May 5, 1923	741.48	.....	741.48
April, 1923	May 29, 1923	June 6, 1923	862.37	.....	862.37
May, 1923	June 28, 1923	July 6, 1923	685.37	.....	685.37
June, 1923	July 31, 1923	Aug. 14, 1923	518.73	.....	518.73
July, 1923	Aug. 31, 1923	Sept. 12, 1923	516.22	.....	516.22
August, 1923	Sept. 29, 1923	Oct. 4, 1923	556.48	.....	556.48
September, 1923	Oct. 31, 1923	Nov. 1, 1923	622.83	.....	622.83
			$27,872.61	.....	$54,682.43

[fol. 19] V

A storage battery such as is involved here is composed of a container (a glass or rubber jar), a positive and negative group of plates immersed in an electrolyte solution (which may be acid or alkaline, depending on the metals used), usually dilute acid, one group of which plates is usually made of red oxide or dioxide of lead and the other group of gray oxide of lead. The oxides usually are spread over a lead frame or grid to form a plate. They are the active ingredients. The dioxide and acid are decomposed and form a new sulphate with the other plate. Small wooden partitions or squares, called separators, are inserted between the plates to keep them from touching, buckling together, or shorting. The negative plates are connected together, as are also the positive plates. A top is put on the jar and sealed over with sealing wax, leaving a terminal post exposed. A cell is composed of a certain number of positive and negative plates.

A battery may consist of one or more cells, usually of from three to six cells. One cell will produce an electric current of two volts. There is no particular shapes for a storage battery. Sometimes storage batteries are oblong, sometimes square, depending on whether the cells are put in end to end or with flat sides together.

VI

The function of a storage battery in an internal-combustion engine is to produce a current of electricity to furnish, in connection with an ignition system, the spark to set the mixture afire. When a gas engine is used in an automobile the battery may furnish an electric current to light the car and start the engine. In lighting plants, radios, doorbells, railway switches, wireless and fire alarms, the storage battery furnishes the current of electricity to do the work required. In such cases there is no spark produced. A storage battery is not required where a magneto is used, but one can be used. Internal-combustion engines where spark plugs are used, can be used for automobiles, tractors, motor boats, stationary engines or airplanes—in fact for any purpose where an internal-combustion engine can be used. The only use for a spark plug would be in an internal-combustion engine. There are a great many places where a battery can be used that a spark plug can not.

VII

The principle of the storage battery was discovered in 1801 by Gautherot and was further developed by Plante, Faure, Edison, and others from 1860 to 1900. Storage batteries were in use for various purposes long before the automobile was invented. Previous to 1911, when storage batteries were first used in gasoline-propelled automobiles, they were used for train lighting, for internal combustion and stationary engines, signal apparatus, doorbells, and wherever an electric current was required. They were used for electrically propelled cars in 1901, and for wireless as early as 1910. Storage batteries were first used in automobiles in 1911 for the purpose of lighting, and for starting [fol. 20] automobiles in 1912 in the Cadillac only. Storage batteries were used for signalling in the Boer War. In any ignition system using a storage battery it is not possible to create the spark for exploding gasoline in the running of an internal-combustion engine by the use of the battery alone.

VIII

For the past twenty years, storage batteries such as are manufactured by plaintiff have been used in electric automobiles, gasoline-propelled automobiles, motor boats, farm tractors, farm lighting plants, airplanes, for propelling mining cars, for propelling small trucks such as baggage trucks, for summer-camp lighting, for door-bells, in railway switches and for wireless telegraphy, and for other purposes where a dependable source of power is needed; also for radios, telephones, telegraph, and fire alarms, and electroplating.

IX

The plaintiff sells its batteries to garage men, accessory dealers, radio dealers, jobbers, and distributors, and has no means of knowing at the time of sale for what purpose its batteries will be used. Usually a garage man in the country supplies the people in the surrounding country. When plaintiff receives an inquiry for farm lighting or radio batteries, such inquiry would come from a garage. Plaintiff does not know what percentage of its batteries are used for any particular purpose. If the batteries are ordered for radio batteries, there is no way of knowing

whether they are used for that purpose. Manufacturers of automobiles and other commercial commodities use batteries having from three to sixteen cells. Automobile manufacturers as a rule equip their cars with standard batteries.

X

No automobile manufacturers use plaintiff's batteries as standard equipment. Nor does any battery concern sell plaintiff's batteries without plaintiff's name plate. Plaintiff manufacturers several types of batteries. Any one of them could be used in some automobile. No battery was made to fit any particular automobile unless specially ordered. The different types have order numbers. The arrangement of the cells of some types of plaintiff's batteries may limit them to a particular make of automobile, but would not limit them for other uses. This applies to all storage batteries.

XI

All the batteries ever manufactured by plaintiff have had straight terminal posts and are so sold unless otherwise specified. Plaintiff does not manufacture battery terminals and does not know what kinds of terminals are going on its batteries after they are sold. Terminals manufactured by other manufacturers can be used. These terminals can be changed at will and other terminals substituted to suit the purpose for which the batteries are needed as herein enumerated. It would take only a few seconds or minutes to change the terminal. Ninety-nine per cent of the batteries leave the factory with straight terminal post without terminals.

[fol. 21] XII

On July 13th, 1922, plaintiff filed its claim for refund of taxes paid on battery parts sold separately by it and obtained a refund on July 19th, 1923, in the sum of $26,809.82 and interest thereon from October 8th, 1922, to April 8th, 1923, in the sum of $360.63.

XIII

On January 15th, 1924, plaintiff filed with the Commission- of Internal Revenue claim for refund in the total sum of $34,282.14, being $27,841.35 for excise taxes

paid on completed storage batteries, on the dates hereinbefore set forth, $3,403.62 for unpaid interest still due on the previous refund of $26,809.82 taxes paid on battery parts sold separately, and $3,005.91 for interest on said taxes paid on completed batteries from the dates of such payments to January 15th, 1924, at 6% per annum, and $31.26 additionally assessed as penalties and interest. The entire claim for refund was wholly rejected and disallowed by the Commissioner of Internal Revenue, on May 5th, 1924.

XIV

It is admitted that the statute of limitations bars recovery of the amount paid on the sales of storage batteries and as penalties and interest thereon prior to January 15th, 1920, in the sum of $2,566.31, covering the period of March, 1919, to and including December, 1919, and plaintiff waives any claim thereto.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

See case of Cole Storage Battery Co., 65 C. Cls., 164.

[fol. 22] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 3rd day of December, A. D., 1928, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing in this cause, the amount thereof to be entered by the Clerk a-d collected by him according to law, the amount of which is found to be $66.03.

See case of Cole Storage Battery Co., 65 C. Cls., 164.

VI. Proceedings After Entry of Judgment

On January 7, 1929, the plaintiff filed a motion for a new trial.

On March 11, 1929, the court entered the following order on said motion:

Order

It is ordered this 11th day of March, 1929, that the plaintiff's motion for new trial be and the same is overruled.

On April 30, 1929, the defendant filed a motion for permission to file motion requesting amendment of findings of fact.

Said motion was overruled by the court May 6, 1929.

[fol. 23] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,258. Court of Claims. Term No. 127. Universal Battery Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed June 4th, 1929. File No. 34,258.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1929

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9940)

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In the Supreme Court of the United States

OCTOBER TERM, 1929.

UNIVERSAL BATTERY CO.,
Petitioner,
vs.
THE UNITED STATES,
Respondent.
No. 127

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

THE OPINION OF THE COURT BELOW

The Court of Claims rendered no opinion. The Special Findings of Fact and Conclusion of Law upon which the judgment is predicated (R. 17-26) are expected to be reported in Volume 67, Court of Claims reports.

JURISDICTION

The judgment of the Court of Claims was rendered on December 3, 1928, (R. 17). The petitioner's motion for a new trial made on January 7, 1929 (R. 26) was overruled by the Court on March 11, 1929 (R. 26). The petition to this Court for Writ of Certiorari was filed on June 4, 1929. Jurisdiction of this court to issue the writ is prayed under Section 240 of the Judicial Code as amended by Section 3 (b) of the Act of February 13, 1925, (43 Stat. 938).

STATEMENT OF THE CASE

The facts in this case are fully set out in the Special Findings of Fact (R. 17-21) made by the Court below. In brief they are:

The petitioner is and has been since 1913, manufacturing and selling storage batteries and storage battery parts. During the period from March 3, 1919, to October 30, 1923, the petitioner paid to the respondent manufacturers excise taxes, penalties and interest in the sum of $27,872.61, upon the sale of storage batteries under section 900, subdivision (3), of the Revenue Acts of 1918 and 1921. The Commissioner of Internal Revenue, on May 15, 1924, denied a refund claim for this amount with interest. The petitioner brought action in the Court of Claims on October 3, 1924, for the refund claimed except for $2,566.31, admittedly barred by the statute of limitations. (R. 17-21.)

The batteries sold by petitioner, during the period in question, were of the same type and kind as had been used, long before the advent of the automobile, in innumerable mechanical devices, where a readily accessable flow of electric current is required. Prior and subsequent to the employment of such batteries in the automobile they were used in signal apparatus, stationary gasoline engines, motor boats, tractors, lighting plants, airplanes, mining cars, railway switches, wireless, telephones, telegraph, radios, fire alarms, door bells, electro-plating, etc. (R. 19-20).

A technical description of the composition of the batteries manufactured by the petitioner can be found in the Special Finding of the court below. (R. 19).

The batteries manufactured by the petitioner reached the consumer through battery distributors, jobbers, radio dealers, garage men and accessory dealers. The petition-

er could not know to what use its batteries would be put when sold by it. The petitioner cannot tell what percentage of its batteries are used for any particular purpose. (R. 28, Par. IX).

No automobile required petitioner's batteries as standard equipment. Any one of the several types of batteries manufactured by the petitioner could be adapted for use in some make of automobile. None of the batteries were made for use in any particular automobile unless the purchaser specifically requested it. Some arrangements of cells might limit the petitioner's batteries to some automobile but would not limit them for the other uses. (R. 28, Par. X).

The terminals on a battery determine the purpose for which the battery may be used. The petitioner did not manufacture such terminals. Ninety-nine per cent of its product left its factory without any terminals. The petitioner did not know what sort of terminals were going on its batteries after they were sold. (R. 28, Par. XI). It does not appear that the petitioner's batteries were especially designed or primarily adapted for use on any of the vehicles designated in the taxing statute.

STATUTES AND REGULATIONS INVOLVED

The Revenue Act of 1918 (c. 18, 40 Stat. 1057) and the Revenue Act of 1921 (c. 136, 42 Stat. 227) contain identical provisions with respect to the question involved in this case and are as follows:

"Section 900. On and after February 1, 1919, [1918 Act; 'January 1, 1922,' 1921 Act] there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following per cent of the price for which so sold or leased:

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or the sale thereof) three per centum.

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, five per centum.

"(3) Tires, inner tubes, parts or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), five per centum."

Regulations 47 promulgated by the Commissioner of Internal Revenue, in pursuance of the authority granted by Congress, provided in part as follows with respect to what constitutes a "part for an automobile truck, automobile wagon, other automobile, or motor cycle," i. e.

"Art. 14. * * * Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a 'part' or 'accessory'."

* * * * *

"Art. 15. * * * any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle."

* * * * *

"Articles, however, which ordinarily would be classed

as commercial commodities, become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles."

"Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as such a component part."

Art. 16. provides: "An accessory for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation."

* * * * *

"Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as 'parts' or 'accessories'."

SPECIFICATION OF ERROR

The Court of Claims erred in finding that the storage batteries manufactured and sold by the petitioner were parts or accessories of automobile trucks, automobile wagons, other automobiles or motor cycles and subject to the manufacturer's excise tax.

SUMMARY OF ARGUMENT

I. The number of similar suits pending in the lower courts and the amounts involved in them warrant the grant of this petition.

II. The decisions of the Court of Claims are confusing,

apparently irreconcilable and do not appear to be applying uniform tests of principle.

III. The Supreme Court has never construed the statute sections involved.

IV. An unappealed decision of a District Court is in conflict with the decision of the court below.

V. Decision by the Supreme Court should eliminate much pending litigation.

VI. It was error to hold that the commercial commodity ordinarily and customarily sold by the petitioner and not primarily adapted for use in automotive vehicles was a part or accessory of such vehicles at the time of sale.

VII. It was error to rest the judgment below upon a case decided upon materially different facts.

ARGUMENT

I. Similar Actions Pending.

One hundred and seven suits involving $2,691,993.42, exclusive of interest, were pending in the Court of Claims alone, at the time this application for writ of certiorari was filed, on the sole question of whether the articles involved in those claims are "parts or accessories" of automotive vehicles. Of these suits fifty-three involved storage batteries of various makes and designs. The petitioner has no device for ascertaining the number of similar cases that may be pending in the United States District Courts.

The point involved in this application is, therefore, of substantial consequence to a number of litigants not to mention innumerable taxpayers who are not litigating these questions.

II. Decisions of the Court of Claims Are Confused and Confusing.

If the decisions of the Court of Claims itself had been uniform and consistent, litigants before that court and the members of its bar might be clear as to what the law in cases of this sort really is. This clarity, however, is lacking. Uniform concepts of principle apparently have not been applied.

In *Atwater-Kent Manufacturing Company v. United States*, 62 Ct. Cls. 419, (decided June 14, 1926) it was held that certain "timers and coils" manufactured by the plaintiff were not taxable as parts or accessories of the automotive vehicles designated in the taxing statute. It was found, as a fact, that timers and coils are used on and are essential to the functioning of *all* internal combustion engines that require ignition of compressed gas. These timers and coils were used prior to the advent of the automobile and were extensively used in industries other than the automotive. Any one of these timers and coils could, by adjustment, be used for other purposes than in automobiles. In the opinion the Court announced what it subsequently said was the doctrine in the case as follows:

> "Where the articles, as those we are concerned with, are applicable for use in different kinds of machines or appliances and are just as applicable to the one use as to the other they are not distinctively parts of automobiles so as to be taxable under these statutes."

Cole Storage Battery Company v. United States, 65 Ct. Cls. 164, (decided April 2, 1928) held that electric storage batteries sold by that plaintiff were taxable under the statute. It was found as a fact that storage batteries

were manufactured prior to the advent of the automobile and were used for many enumerated purposes other than upon the automotive vehicles designated by the statute. It was found that plaintiff's batteries were designed for the special purpose of being used to replace a component part of automobiles. As to the controlling principle, the Court said:

> "The fact that a storage battery is available for use for a number of purposes other than for an automobile, or, that its creation antedated the invention of the automobile, is not determinate of the issue. A variety of parts of an automobile are susceptible for use in other devices, and other parts, both as to form and functioning elements, existed long prior to the coming of the automobile itself. What seems to us to turn the contention is the fact that in a combination of various elements to function in a certain way the accomplishment of the purpose is only attainable where a gasoline engine is used by coupling certain elements up with a storage battery, and without its presence the mechanism is useless. We think, therefore, that where a manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualities of his battery, and designs it as part of the automobile into which it is to be introduced, Congress intended by the taxing act to reach it as a source of revenue."

The only reference to the Atwater-Kent case made in this opinion, which so sharply conflicts with the doctrine announced in that case, is as follows:

> "The *Atwater-Kent Manufacturing Co.* case, 62 Ct. Cls. 419, is self-explanatory."

Subsequent to the decision in the *Cole Storage Battery Company* case the Court decided, on October 22, 1928, *Milwaukee Motor Products, Inc. v. United States*, 66 C. Cls. 295. In this case timers made by the plaintiff were found to be necessary for use on internal combustion engines. They were especially advertised for use on automobiles, particularly Fords, though also advertised for use on tractors and on any gasoline engines. The Court found that Ford engines were used in tractors, stationary power plants, concrete mixers and in other non-motive vehicle functions. The Court in deciding this case made no reference whatever to its decision in the Cole Storage Battery Case but said:

> "We believe that this case should be determined by the doctrine announced in the Atwater Kent case, supra:
>
> 'Where the articles, as those we are concerned with, are applicable for use in different kinds of machines or appliances and are just as applicable to the one use as to the other they are not distinctively parts of automobiles so as to be taxable under these statutes'."

Concerning this decision the Government's motion for a new trial said:

> "The decision in the pending case cannot be reconciled with the judgment in the Cole Storage Battery case."

With this statement we are in full accord.

Six weeks later, on December 3, 1928, the Court decided the case on which the present petition is urged. Notwithstanding what would seem to be controlling similarities to *Atwater-Kent Manufacturing Co. v. United States*, discussed above, the Court made no reference to

that case in its decision and decided the present matter solely on authority of *Cole Storage Battery Company v. United States*, 65 C. Cls. 164.

On March 11, 1929, the Court decided *Berg Brothers Manufacturing Company, Inc. v. United States*, 67 Ct. Cls. ——.

There a timer sold by the plaintiff was manufactured specifically for Ford internal combustion engines used in automobiles or tractors. It was advertised as "Berg timers for the Ford" also as "Berg timers for Fords." The Court, in holding this timer not to be a part or accessory of an automobile said:

> "It is apparent that plaintiff's timers were not specially designed nor primarily adaptable only for use on or in connection with automobiles. The Milwaukee Motor Products, Inc. case, supra, is decisive of the present case. See also *Atwater-Kent Manufacturing Company v. United States*, 62 Ct. Cls. 419."

No reference is made in the opinion to the decision in *Cole Storage Battery Company v. United States*, or to the case which is the subject of this petition.

The last decision of the Court of Claims which is pertinent to the general principle is that in *Edison Storage Battery Supply Company v. United States*, 67 Ct. Cls.— (decided May 6, 1929). In that case it was found that batteries manufactured by the plaintiff were taxable because they were utilized for furnishing automotive power for automobile trucks, were advertised for this use and were shipped by the plaintiff to consumers for such use. The Court said:

> "The facts clearly show that the Edison battery possesses all the necessary characteristics of a bat-

> tery for furnishing, and does furnish, motive power to automobile trucks. The fact that these batteries can be used for other purposes is not important. There are many parts of an automobile that can be and are used for other purposes. The form of battery taxed here was clearly specially adapted and designed and advertised to meet the requirements of motive power on automobile trucks."

The Court cites with approval *Cole Storage Battery Company v. United States*, 65 C. Cls. 164.

The opinion makes no reference whatever to the decisions of the Court in *Milwaukee Motor Products, Inc. v. United States*, and *Berg Brothers Manufacturing Company, Inc. v. United States*, both referred to above, in which cases timers were especially adapted, designed and advertised to meet the essential requirements of ignition in internal combustion engines and in automobile engines. Reconciliation of these cases with the decision in both the *Edison Storage Battery Supply Company* and the *Cole Storage Battery Company* cases appears to have been too difficult a task even for the Court to undertake.

The Court does, however, announce that what it meant to hold in the *Atwater-Kent Manufacturing Company* case, 62 C. Cls. 419, was that:

> "timers and coils were not to be classified as parts of automobiles simply because they might be used on automobiles, in the absence of proof that at the time when sold it was intended that the articles should be used on automobiles, and where also there had been no setting aside or allocation by advertising or otherwise of timers or coils for automobile use."

No attempt is made to reconcile this principle, newly

discovered to have been employed in the Atwater-Kent case, with the decisions of the Court in *Milwaukee Products, Inc. v. United States*, 66 Ct. Cls. 295, *Berg Brothers Manufacturing Company, Inc. v. United States*, 67 Ct. Cls. —— (decided March 11, 1929).

The truth is that it is practically impossible, if not altogether so, for members of the bar to determine just what principles the Court of Claims is going to apply in deciding what constitutes a part or accessory of the automotive vehicles designated in the taxing statute. Other decisions of the court might be cited to demonstrate this perplexity but the above decisions have been selected to illustrate the difficulties which meet one who approaches the problem with even unprejudiced purposes. Until a guiding principle is laid down by this Court, to which standard the Court of Claims can resort, much uncertainty resulting in wasteful litigation would seem to be unavoidable.

This Court has the opportunity to terminate much of this substantial waste and this distressing uncertainty by granting the petition in the present case.

III. This Court Has Never Construed These Sections of Statutes Involved.

While millions of dollars in taxes have been collected under the sections of the revenue acts cited, we have not yet had any construction by this Court of the phrase "parts or accessories." We have not had a construction even by a Circuit Court, of the principle involved in these acts.

A thorough search of decisions of this Court indicates that no substantially equivalent cases have been decided here since Magone v. Weiderer, 159 U. S. 555, decided in 1893. That case was the last of a line of cases on tariff

rate classifications and brought to this Court the question of whether certain pieces of glass constituted "parts" of clocks, or articles of glass. Mr. Justice White summarizing and reconciling similar but possibly conflicting decisions, held that the classifications of this character were to be decided by the use to be made of the article. Approving the "chief use" as the determining factor, he said:

> "Chief use, in itself, is a vague and uncertain term. Magone v. Heller, therefore, held that chief use was to be ascertained by that which was commonly, practically and generally done and was not to be overthrown by an occasional exception for practical or experimental purposes."

He also said:

> "if it [a substance] is commonly, practically and profitably used for a different purpose, it cannot be considered as used expressly for manure, even if, in the majority of instances it is so used."

The use of the rule thus announced in the tariff classification cases has been suggested to the Court of Claims in a number of briefs filed in causes involving the excise taxes on parts or accessories of automotive vehicles designated by the statute but thus far that court does not seem to have found such a doctrine helpful. If resort to that group of decisions is of no avail we are, in the absence of the construction of the statutory sections here involved, without a reliable guide from this tribunal.

IV. The Unappealed Decision of a District Court Is in Conflict With the Court of Claims Decision.

In *Philadelphia Storage Battery Co. v. Lederer*, and an associated case, 21 Fed. 2nd 320, Judge Dickinson, sitting in the U. S. District Court for the Eastern District of Pennsylvania, held that storage batteries could not be taxed as automobile parts or accessories when they are so extensively known as articles of commerce for non-automobile uses.

In his opinion he said:

> "Our finding is that there is no such thing as 'an automobile storage battery' or a 'storage battery for automobiles' in the nomenclature of the trade and no 'article' or thing so known. It follows that the plaintiff did not make or sell any. What it sold were 'storage batteries' and these are not taxed by the Act. The construction which we give to the phrase 'sold for automobiles' is not anything which the seller or buyer intends for automobile use or that which is in fact so used nor anything which is adapted to such use but it is whether the thing attempted to be taxed can be identified as the thing which the law has taxed by the name or descriptive phrase used in the law."

Though this decision of Judge Dickinson is in conflict, in both the doctrine of construction announced and in its application, with the decisions of the Court of Claims the Government has not sought to appeal the holding. We are thus afforded no opportunity to cite a possible conflict between a Circuit Court of Appeals and the Court of Claims on the question involved in this application.

V. Decision by This Court of the Question Involved Should Eliminate Much Pending Litigation.

It is to be presumed that the more than one hundred

actions brought in the Court of Claims, not to mention the United States District Courts, have been brought in good faith upon the conclusions of the attorneys involved that the application of the law by the Commissioner of Internal Revenue is probably erroneous. In the absence of something in the way of final pronouncement by this Court regarding the principles which shall control in determining whether a given article is a "part or accessory," it is to be presumed that not only will these pending cases be tried before the Court of Claims and the District Courts but good faith and thoroughness will require an effort, in many of them, to secure a decision of this court. It is reasonable to suppose that a great number of writs of certiorari will be applied for from this court in the event the parties are dissatisfied with the decisions of the courts below.

It seems fair to prophesy that if this court will grant the writ of certiorari in the present case and announce the principles which shall determine in the application of the taxing act not only will much of the time of the Court of Claims and the District Courts be conserved but this Court itself will obviate the repeated necessity of its considering applications for writs of certiorari in cases similar to that now at bar.

VI. The Court of Claims Erred in Deciding That the Term "Parts or Accessories" of Certain Automotive Vehicles Includes a Device Not Found to Be Specially Designed for Use in Such Vehicles, but Found to Be a Commercial Commodity Ordinarily and Customarily Sold for Many General Uses Other Than in Automotive Vehicles.

In this case, upon which the writ is sought, the Court

of claims found as facts:

A. "Storage batteries were in use for various purposes long before the automobile was invented." (R. 23, Par. VII).

B. "For the past twenty years, storage batteries such as are manufactured by plaintiff have been used in electric automobiles, gasoline-propelled automobiles, motor boats, farm tractors, farm lighting plants, airplanes, for propelling mining cars, for propelling small trucks such as baggage trucks, for summer camp lighting, for door-bells, in railway switches and for wireless telegraphy, and for other purposes where a dependable source of power is needed; also for radios, telephones, telegraph, and fire alarms and electroplating." (R. 23, Par. VIII).

C. "The plaintiff sells its batteries to garage men, accessory dealers, radio dealers, jobbers, and distributors, and has no means of knowing at the time of sale for what purpose its batteries will be used." (R. 23, Par. IX).

D. "No automobile manufacturers use plaintiff's batteries as standard equipment." (R. 24, Par. X).

E. "The arrangement of the cells of some types of plaintiff's batteries may limit them to a particular make of automobile, but would not limit them for other uses." (R. 24, Par. XI).

These findings mean that an article, (1) in use for a wide variety of purposes, prior and subsequent to the advent of the automobile, (2) sold for uses unknown at the time of its sale by the manufacturer, (3) not used by any automobile as standard equipment, (4) not limited for uses other than upon an automobile, (5) not found to be designed, or (6) primarily adaptable, for automotive use, was nevertheless determined to be a part or accessory of an automobile.

Discarding any attempt to reconcile the decisions of

the Court of Claims adverse to the payers of these excise taxes with its decisions favorable to such taxpayers, we think it clear that none of the facts found in the case at bar should bring the case within even the most hostile rulings of that court. The decisions of that court are grouped below according to what seem to be the determining facts respecting the article questioned.

Group I. The articles were held to be taxable because they were specially adaptable and designed with the purpose, and so advertised, of being used in automobiles; *Autoquip Manufacturing Company v. U. S.*, 67 Ct. Cls. —— (decided June 10, 1929), involving air pumps and anti-rattler window devices; *Cole Storage Battery Co. v. U. S.*, 65 Ct. Cls. 164, involving storage batteries; *E. Edelmann & Company v. U. S.*, 67 Ct. Cls. ——, (decided June 3, 1929), and involving clocks and anti-rattler window devices.

Group II. The articles were taxable because found to be especially designed and sold for use on automobiles; *Advance Automobile Accessories Corporation v. U. S.*, 66 Ct. Cls. 304, involving brake linings for Ford cars; *Amplus Storage Battery Company v. U. S.*, 67 Ct. Cls. —— (decided March 11, 1929), involving storage batteries; *Edison Storage Battery Company v. U. S.*, 67 Ct. Cls. —— (decided May 6, 1929), involving storage batteries; *Walker Manufacturing Company v. U. S.*, 65 Ct. Cls. 394, involving lifting jacks.

Group III. The articles were taxable because found to be adaptable for use on automobile engines and advertised for such use; *Bassick Manufacturing Company v. U. S.*, 67 Ct. Cls. ——, (decided June 10, 1929), involving gasoline strainers; *Borg & Beck Company v. U. S.*, 67 Ct. Cls. ——, (decided March 11, 1929) involving clutches for internal combustion engines; *The Fairmount*

Tool and Forging Company v. U. S., 67 Ct. Cls. ——, (decided June 3, 1929) involving hand tools assembled in kits.

It should be clear that the facts specially found by the court in the case at bar do not bring it within any of these groups. The petitioner's storage batteries were not found to be especially designed, or advertised, or sold, or intended to be sold for use on automobiles. Judged even by the non-conflicting decisions of the Court of Claims, the holding in the petitioner's case was in error.

If the doctrine of this court, as announced in the tariff classification cases of *Magone v. Wiederer*, 159 U. S. 555, and *Magone v. Heller*, 150 U. S. 70, is the proper method for determining what constitutes a "part" then certainly the foregoing facts found in the case at bar do not make the petitioner's storage batteries automobile parts. That is to say this court has said in the Wiederer and Heller cases that whether or not a substance, or an article, is a part of a designated assembly depends upon whether the use of that article, or substance, in such designated assembly is its "chief" use. If the substance or article is commonly, practically and profitably used for different purposes its chief use cannot be said to be in the designated assembly. Hence it is not a "part" of that assembly.

If this be the proper test applicable to the petitioner's batteries certainly the facts found by the Court of Claims would not warrant finding these batteries to be parts for automobiles. The common, practical and profitable use of the petitioner's batteries for many other purposes should effectively bar their classification as parts of automobiles.

If granted the writ now prayed for the petitioner is prepared to develop the thesis that error exists in the decision below in view of the law generally.

VII. The Sole Authority Assigned by the Court of Claims for Its Decision Is Its Own Holding In Cole Storage Battery Co. v. U. S., the Determinative Facts in that Case Are so Obviously Absent in This That Error Is Apparent.

It is important to compare the facts in the petitioner's case and those in the Cole case because this court has heretofore refused the application for a writ of certiorari in that case (October 29, 1928).

Below we give the determinative facts in *Cole Storage Battery Company v. U. S.*, 65 Ct. Cls. 164, which is the case cited by the court below as the basis of its decision in the case at bar. Directly beneath the statement of each determinative fact in the Cole Storage Company case we point out the contrast in the case at bar.

1. In the Cole case it was found, "Plaintiff during the period involved in this suit, manufactured and sold lighting and starting batteries which were designed for the special purpose of being used to replace a component part for automobiles."

In the case at bar the petitioner did not sell batteries designed for the special purpose of being used to replace a component part for automobiles. It was found, as a fact, that no automobile manufacturer used the petitioner's batteries as standard equipment. It was found that no battery of the petitioner was made to fit any particular automobile unless specially ordered. It was found that any arrangement of the cells on the petitioner's batteries did not limit them for other uses than on automobiles.

2. In the Cole case it was found: "Plaintiff's business policy was to manufacture a battery which would be used

on any make of automobile equipped with a storage battery."

In the case at bar it was not found that it was the petitioner's business policy to manufacture a battery which would be used on any make of automobile. As a fact, it was found that the petitioner had no means of knowing at the time of sale for what purpose its batteries would be used. The petitioner did not know what percentage of its batteries are used for any particular purpose. Finally it was found that the batteries manufactured by the petitioner had straight terminal posts and that the petitioner did not know what kind of terminals (a feature which determines the use for which the battery is employed) were going to be put upon its batteries after they were sold.

3. In the Cole case it was found: "Plaintiff specialized on a battery with thin plates, as this would tend to produce a battery with more spontaneous action for the starting device of an antomobile."

In the case at bar the petitioner did not specialize on a battery with thin plates to produce more spontaneous action for the starting device of automobiles. There was no finding to this, or any similar effect.

4. In the Cole case the court said: "* * * [This] manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualifications of his battery, and designs it as a part of the automobile into which it is to be introduced * * *."

It was not found that the petitioner sought the custom of the automobile trade as distinguished from any other trade. It was not found that the plaintiff designed its battery as part of the automobile into which it might be introduced.

While both the Cole Storage Battery Company and

the petitioner made and sold storage batteries, we find it impossible to discover from a review of the determinative factual findings of the Court of Claims in these two cases, any substantial similarity between the batteries and their purposes. When the Court of Claims decided the instant case against the petitioner it must either have confused the petitioner's design, batteries, and business policy with those of the Cole Storage Battery Company, or else it was acting upon the hypothesis that all storage batteries are parts of automobiles until utilized for some other purpose.

Upon either alternative there was error. There is no indication whatever that the petitioner's batteries were designed, were adaptable, or were sold for the special purpose found in the case of the Cole Storage Battery Company's batteries. On the other hand, no matter how well decided the Cole case may have been, that case, with its references to design for the special purpose of being used in automobiles, can afford no authority for a conclusion that all storage batteries are so designed or sold.

CONCLUSION

Because a pronouncement by this court of the true principles of law to govern the decision of similar cases should materially decrease the amount of litigation, relieve the burden of the courts below, as well as this court, and because injustice has been done to this petitioner below, it is submitted that the grant of the petition in this case would be of sufficient public importance to warrant such action by this court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 127

UNIVERSAL BATTERY COMPANY,

PETITIONER

v.

THE UNITED STATES,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF ON BEHALF OF PETITIONER

THE ACTION OF THE COURT BELOW

The Court below, the Court of Claims, rendered no opinion. The dismissal of the petition in that court is recorded in Volume 66, Court of Claims Reports. The Findings of Fact and Conclusions of Law upon which the action of the Court of Claims was predicated are given in the record herein at pages 17-26.

JURISDICTION OF THIS COURT

The judgment of the Court of Claims was rendered on December 3, 1928 (R. 17). The petitioner's motion for a new trial made on January 7, 1929, was overruled by that Court on March 11, 1929 (R. 26). The defendant's motion for permission to file motion requesting amendment of findings of fact was overruled May 6, 1929 (R. 26). The petition to this Court for Writ of Certiorari was filed on June 4, 1929, and was granted October 14, 1929. The writ was issued by this court under Section 240 of the Judicial Code as amended by Section 3 (b) of the Act of February 13, 1925 (43 Stat. 938).

THE QUESTION PRESENTED

The sole question in this case is whether the electric storage batteries manufactured and sold by this petitioner to any person other than an automobile manufacturer or producer, are "parts or accessories" of automobile trucks, automobile wagons, other automobiles and motor cycles, within the meaning of the statutes taxing the sale of such parts or accessories.

STATUTES AND REGULATIONS INVOLVED

Statutes.

The Revenue Act of 1918 (c. 18, 40 Stat. 1057) and the Revenue Act of 1921 (c. 136, 42 Stat. 227) contain materially identical provisions with respect to the ques-

tion involved in this case and are as follows:

"Section 900. On and after February 1, 1919 [1918 Act; 'January 1, 1922,' 1921 Act] there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following per cent of the price for which so sold or leased:

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or the sale thereof) 3 per centum.

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.

"(3) Tires, inner tubes, parts or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

Regulations of Treasury Department.

Regulations 47 promulgated by the Commissioner of Internal Revenue, in pursuance of the authority granted by Congress, provided in part as follows with respect to what constitutes a "part for an automobile truck, automobile wagon, other automobile, or motor cycle," i. e.

"Art. 14. * * * Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a 'part' or 'accessory.'"

* * * * *

"Art. 15. * * * any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle."

* * * * *

"Articles, however, which ordinarily would be classed as commercial commodities, become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles."

"Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as such a component part."

Art. 16 provides: "An accessory for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be

attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation."

* * * * *

"Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as 'parts' or 'accessories.'"

STATEMENT OF THE CASE

The facts in this case are fully set out in the Special Findings of Fact (R. 17-26) made by the Court below. In brief they are:

The petitioner is, and has been since 1913, manufacturing and selling storage batteries and storage battery parts. During the period from March 3, 1919, to October 30, 1923, the petitioner paid to the respondent manufacturers' excise taxes, penalties and interest in the sum of $27,872.61 upon the sale, to persons other than manufacturers or producers of automobile trucks, automobile wagons, other automobiles and motor cycles, of electric storage batteries under Section 900, subdivision (3), of the Revenue Acts of 1918 and 1921. The Commissioner of Internal Revenue, on May 15, 1924, denied a refund claim for this amount with interest. The petitioner brought action in the Court of Claims on October 3, 1924,

for the refund claimed except for $2,566.31, admittedly barred by the statute of limitations. (R. 17-21, Par. I-IV).

The batteries sold by petitioner, during the period in question, were of the same type and kind as had been used, long before the advent of the automobile, in innumerable mechanical devices, where a readily accessible and dependable flow of electric current is required. Prior and subsequent to the employment of such batteries in the automobile they were used in signal apparatus, stationary gasoline engines, motor boats, tractors, lighting plants, airplanes, mining cars, railway switches, wireless, telephones, telegraph, radios, fire alarms, door bells, electro-plating, etc. (R. 23. Par. VII-VIII).

A technical description of the composition and function of the batteries manufactured by the petitioner can be found in the Special Findings of Fact V and VI of the Court below. (R. 22.)

The batteries manufactured by the petitioner reached the consumer through battery distributors, jobbers, garage men, accessory dealers, and radio dealers. The petitioner could not know to what use its batteries would be put when sold by it. The petitioner cannot tell what percentage of its batteries are used for any particular purpose. (R. 23, Par. IX.)

No automobile required petitioner's batteries as standard equipment. Any one of the several types of batteries manufactured by the petitioner could be adapted for use in some make of automobile. None of the batteries were made for use in any particular automobile

unless the purchaser specifically requested it. Some arrangements of cells might limit the petitioner's batteries to some automobile but would not limit them for the other uses. (R. 24, Par. X.)

The terminals on a battery determine the purpose for which the battery may be used. The petitioner did not manufacture such terminals. Ninety-nine per cent of its product left its factory without any terminals. The petitioner did not know what sort of terminals were going on its batteries after they were sold. (R. 24, Par. XI.) It does not appear that the petitioner's batteries were especially designed or primarily adapted for use on any of the vehicles designated in the taxing statute.

Upon these facts the Court of Claims, in its Conclusion of Law, found that the electric storage batteries sold by the petitioner were parts or accessories for automobile wagons, automobile trucks, automobiles or motor cycles and subject to tax. It dismissed with costs the petitioner's claim for a refund of the taxes paid. The Court cited, as a single authority, without discussion, *Cole Storage Battery Company vs. United States*, 65 *Ct. Cls.* 164.

SPECIFICATION OF ERRORS TO BE URGED

I. The Court of Claims erred in finding that the electric storage batteries manufactured and sold by the petitioner were parts or accessories of automobile trucks, automobile wagons, other automobiles or motor cycles and subject to the excise tax on the sale of such parts or accessories.

(a) The Court of Claims erred in its implied finding

that the material facts in this case are the same as those in *Cole Storage Battery Company vs. U. S.*, 65 *Ct. Cls.* 164, and in rendering judgment against the petitioner upon such grounds.

(b) The Court of Claims erred in its implied finding that the rule announced in *Cole Storage Battery Company vs. U. S.*, 65 *Ct. Cls.* 164, is a correct statement of the intent of the statute involved in this case and in rendering judgment against the petitioner upon such ground.

(c) The Court of Claims erred in failing to decide that the petitioner is entitled under the law to judgment.

SUMMARY OF ARGUMENT

It is the petitioner's contention:

(A) That the material facts in the petitioner's case are so essentially different from the facts found in *Cole Storage Battery Company vs. U. S.*, 65 *Ct. Cls.* 164, cited by the Court below as authority for its decision in the case at bar, that it is reversible error to apply the rule in that decision to the facts in this case.

(B) That the rule of law announced by the Court below is not a proper statement of the law applicable to this case for the reason that:

(1) The absence from Section 900, subdivisions (1), (2) and (3), of the extensive language used elsewhere in Sections 900, 907 of the statutes involved, negatives any intent to tax as parts or accessories for automobiles, etc., any articles other

than those which are strictly parts of the vehicles taxed.

(2) The rule of law evolved below is in direct conflict with the principle that the accepted use of the nomenclature involved shall be employed to determine the limits of the taxing clause.

(3) The rule evolved below is in material conflict with the "usage" doctrine developed by this court to determine taxable classifications.

(C) The proper rules of interpretation demonstrate that the electric storage batteries sold by this petitioner are not parts or accessories for automobiles, etc., and are not taxable as such.

ARGUMENT

(A) *The material facts in the petitioner's case are so essentially different from the facts in the case cited by the court below as controlling that the cited case is not authority for the decision made in this case.*

The Conclusion of Law of the Court of Claims deciding against the plaintiff is issued without discussion save for the reference, "See case of Cole Storage Battery Company, 65 Ct. Cls. 164." Below are recited what appear to be the determinative facts in that case. Directly beneath the statement of each determinative fact in the Cole Storage Company case we point out the contrast in the case at bar.

1. In the Cole case it was found, "Plaintiff during the period involved in this suit, manufactured and sold

lighting and starting batteries which were designed for the special purpose of being used to replace a component part for automobiles."

In the case at bar the petitioner did not sell batteries designed for the special purpose of being used to replace a component part for automobiles. It was found, as a fact, that no automobile manufacturer used the petitioner's batteries as standard equipment. It was found that no battery of the petitioner was made to fit any particular automobile unless specially ordered. It was found that any arrangement of the cells on the petitioner's batteries did not limit them for other uses than on automobiles.

2. In the Cole case, it was found: "Plaintiffs' business policy was to manufacture a battery which would be used on any make of automobile equipped with a storage battery."

In the case at bar it was not found that it was the petitioner's business policy to manufacture a battery which would be used on any make of automobile. As a fact, it was found that the petitioner had no means of knowing at the time of sale for what purpose its batteries would be used. The petitioner did not know what percentage of its batteries were used for any particular purpose. Finally, it was found that the batteries manufactured by the petitioner had straight terminal posts and that the petitioner did not know what kind of terminals (a feature which determines the use for which the battery is employed) were going to be put upon its batteries after they were sold.

3. In the Cole case it was found: "Plaintiff specialised on a battery with thin plates, as this would tend to produce a battery with more spontaneous action for the starting device of any automobile."

In the case at bar the petitioner did not specialize on a battery with thin plates to produce more spontaneous action for the starting device of automobiles. There was no finding to this, or any similar effect.

4. In the Cole case the court said: "* * * [This] manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualifications of his battery, and designs it as a part of the automobile into which it is to be introduced * * *."

It was not found that the petitioner sought the custom of the automobile trade as distinguished from any other trade. It was not found that the plaintiff designed its battery as part of the automobile into which it might be introduced.

While both the Cole Storage Battery Company and the petitioner made and sold electric storage batteries, we find it impossible to discover from a review of the determinative factual findings of the Court of Claims in these two cases, any substantial similarity between the design of the batteries, the intended purposes and sale policies, of their makers. When the Court of Claims decided the instant case against the petitioner it must either have confused the petitioner's design, batteries, and business policy with those of the Cole Storage Battery Company, or else it was acting upon the hypothesis that all storage batteries, at the very moment of manu-

feature, are parts or accessories of automobiles.

Upon either alternative there was error. There is no indication whatever that the petitioner's batteries were designed, were adapted, or were sold for the special purpose found in the case of the Cole Storage Battery Company's batteries. No matter how well decided the Cole case may have been, that case, with its references to the special purpose of being used in automobiles, can afford no authority for the decision in the case of the petitioner whose electric storage batteries were neither so designed nor sold.

It should be apparent that the facts in the petitioner's case are so essentially different from the facts found in the Cole Storage Battery Company's case that it is reversible error to apply the rule evolved in that decision to the facts in this case.

(B) *The doctrine announced by the court below is not a correct statement of the law applicable to the case at bar and similar cases.*

The doctrine in *Cole Storage Battery Company vs. United States*, 65 *Ct. Cls.* 164, cited by the Court below as the single authority for its decision, seems to be fairly stated in the words employed by the Court of Claims in its opinion in that case, i. e.

> "This case in our opinion turns upon the restricted issue as to whether a storage battery, especially adapted for and so designed and advertised as to meet the essential requirements of locomotive power, is a part or accessory of an automobile. The fact that a storage battery is

> available for use for a number of purposes other than for an automobile, or, that its creation antedated the invention of the automobile, is not determinate of the issue. A variety of parts of an automobile are susceptible of use in other devices, and other parts, both as to form and functioning elements, existed long prior to the coming of the automobile itself. What seems to us to turn the contention is the fact that in a combination of various elements to function in a certain way the accomplishment of the purpose is only attainable where a gasoline engine is used by coupling certain elements up with a storage battery, and without its presence the mechanism is useless. We think, therefore, that where a manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualities of his battery and designs it as part of the automobile into which it is to be introduced, Congress intended by the taxing act to reach it as a source of revenue."

That opinion predicates the decision of the case simply upon criteria of use and intended use of the article in question. The court says that what constitutes a part, or accessory, of an automobile, etc., is determined by: (1) advertisement that the article will meet the essential requirements of an automobile; (2) design and adaptation of the article to meet the essential requirements of an automobile (although admittedly available in that design and adaptation for a number of purposes other than for an automobile); (3) the necessity of the presence of the article for an automobile to function; (4) the

circumstance that the automobile trade is one of the markets sought by the maker. Has not the court below, in a resume of the evidence, lost sight of the principles of law involved?

Our contention is that neither the terms employed in the statute nor the principles established by this court for determining taxable classifications will support the rule evolved by the Court below from the criteria recited.

The Language of the Statute Generally.

The absence from Section 900, subdivisions (1), (2) and (3), of the extensive language used elsewhere in Section 900, 907 of the statutes involved, negatives any intent to tax as parts or accessories for automobiles, etc., any articles other than those which are strictly parts of the vehicles taxed.

The 1918 statute—Excise Taxes, Sections 900, 907*—proposes a tax, not upon all sales of commodities, not a general sales tax, but a tax upon the sale of specific articles and classes of articles definitely named and apparently selected with care. That Congress was familiar with inclusive and generic clauses and that the draftsmen of the bill were capable of expressing all the inclusions intended is evidenced by the following clauses of this character employed, i. e. (emphasis ours):

"Sec. 900. * * * (4) Pianos, organs * * * and records *used in connection with any* musical in-

*See Appendix I

strument, piano player, graphophone, phonograph, or talking machine, * * *"

"Sec. 907 (a) * * * (1) Perfumes, essences, extracts * * * *or any similar substance, article, or preparation by whatsoever name known or distinguished, any of the above which are used or applied or intended to be used or applied for toilet purposes;"

These clauses quoted are expansive, they imply a broad inclusion, an omnibus intention. Such clauses, occurring in such close proximity, were readily at hand to be applied to expand "parts, and accessories therefor" in Subdivisions (1), (2) and (3), Section 900, if there had been any such intent upon the part of the Congress.

If Congress had intended that all commodities which could be used as parts of automobiles, were to be taxed, the most natural action would have been to borrow from the immediately neighboring subsections of the statute clauses which would express that intent. The statute might have read, for example, "parts or accessories *used in connection with any*† automobile, automobile truck, * * *." Even better would have been "parts, or accessories, *or any similar substance, article, or preparation by whatsoever name known or distinguished which are used or applied or intended to be used or applied*†† upon automobiles, automobile trucks * * *."

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†Borrowed from Section 900 (4)

††Borrowed from Section 907 (a) (1)

Is not the absence of one of these omnibus clauses from "parts or accessories therefor" significant as to the breadth of inclusion intended?

If the intention was to tax electric storage batteries, which are equally parts of many devices besides automobiles, would not one expect to find those other devices of which the batteries are a part also taxed? There is no mention in the taxing statutes, however, of a tax on signal apparatus, stationary gasoline engines, lighting plants, airplanes, mining cars, railway switches, etc., etc. Was it the intention to tax parts of these machinery assemblies and not the assemblies themselves? It could hardly be the intention to tax, not all the parts of these assemblies, but only the parts of such non-taxed assemblies which could be used in automobiles.

If it were the intention to tax electric storage batteries, which are themselves important commercial commodities, made up from a number of parts, why were they not specifically named? Certainly they are of a commercial importance equal to that of many other articles specifically named, e. g., polo mallets, skiis, sword canes, carafes, fans, sunshades, lorgnettes, etc. If the automobile had never been invented the electric storage battery would still be a commodity so extensively bought and sold that a substantial tax could have been raised upon such sales. Why such an indefinite, circuitous description if it were the intention to tax such a familiar device?

Even if there were no other more convincing guides to ascertaining the intention of the legislature, we submit that, in view of the surrounding language in the statutes

involved, the designation of other articles to be taxed and the omission of still other articles of which electric storage batteries are a part, it is correct to conclude that the inclusion of such batteries as parts or accessories for automobiles and the vehicles named in the statute is unwarranted and a holding for such inclusion is a reversible error.

Established Tax Classification Doctrines.

Assuming, however, for the sake of the argument, that our interpretation of the statute is not satisfying, to what key are we to turn? The statute directs an excise duty upon the sale of an article. It is upon that article and what it is at the moment it is sold that the tax attaches. The question is, does this article bear a duty or is it upon the "free list." That problem is a familiar one to this Court. Indeed it is difficult to avoid the belief that Congress tacitly intended that disputes as to the definition of terms in the legislation under review should be decided under the doctrines already developed by this Court for such purposes. Let us consider these principles as applied to the decision of the Court of Claims in this case.

The Nomenclature Rule.

We submit that the rule of law evolved below is in direct conflict with the principle that the accepted use of the nomenclature involved should be resorted to in determining the limits of the taxing clause.

One recognized method upon which Congress may fairly be presumed to have relied, for classifying the article

in question, is to discover whether the commercial, or ordinary and commonly accepted, name of the article brings it within the terms of the tax. *(Chew Hing Lung & Co., vs. Wise,* 176 *U. S.* 156; *Sonn vs. Magone,* 159 *U. S.* 417; *DeJonge vs. Magone,* 159 *U. S.* 562; *Hartranft vs. Meyer,* 149 *U. S.* 544; *Maillard vs. Lawrence,* 16 *How. (57 U. S.)* 251; *U. S. vs. Massachusetts General Hospital,* 100 *Fed.* 932; *Philadelphia Storage Battery Co., vs. Lederer, Collector,* 21 *Fed. (2nd)* 320.) While some of these cited cases are concerned with whether the commercial name or the common name shall prevail for purposes of definition, that issue is not involved in the case at bar for the reason that there is no difference between the meaning and implication of the trade term "electric storage batteries" and the term "electric storage batteries" in common speech.

In *Philadelphia Storage Battery Company vs. Lederer, Collector,* 21 *Fed. (2nd)* 320, District Judge Dickinson, had under consideration the identical statutes here involved. Further, he was considering whether electric storage batteries, the identical articles now before us, were subject to tax under these statutes as parts or accessories for automobiles, etc. He approaches the problem from the angle of identifying the article sought to be taxed by the accepted meaning of the language Congress employed in describing the thing taxable. His view is that "parts, or accessories, therefor," is a part of the name of the article. He gives an example.

> "For illustration, among the things taxed are tires. The full name given the thing to be taxed

> is a 'tire for an automobile' or in other words, an 'automobile tire.' If there is a thing known to the trade as an automobile tire, or as a tire for automobiles, then that is the thing taxed. If there is no such known thing (that is no thing thus known) then there is nothing to which the tax can attach and you cannot tax something else on the plea that it is a thing which will serve the purpose of a tire on an automobile."

Turning then to electric storage batteries Judge Dickinson says:

> "Our finding is that there is no such thing as an 'automobile storage battery' or a 'storage battery for automobiles' in the nomenclature of the trade and no 'article' or thing so known. It follows that the plaintiff did not make or sell any. What it sold were 'storage batteries' and these are not taxed by the Act. The construction which we give to the phrase 'sold for automobiles' is not anything which the seller or buyer intends for automobile use or that which is in fact so used nor anything which is adapted to such use but it is whether the thing attempted to be taxed can be identified as the thing which the law has taxed by the name or descriptive phrase used in the law."

In selecting the identification through the nomenclature rule, the District Judge was not unmindful of the principle of identification through use. Concerning the taxpayer's contention that if storage batteries are commercial articles generally for a varied use including auto-

mobile purposes, then they cannot be for automobile use for the reason that they are for other uses also, the court says:

> "If this is the correct view, the plaintiff should have judgment because we have found that storage batteries do have these other uses for which they are sold in the ordinary course of business. To this we add the further finding to which the plaintiff gives some emphasis, that storage batteries were in use before the automobile and would be made and sold today if the automobile had never come into existence."

There can be but little doubt as to the character of the decision in the case at bar if it had been tried in Judge Dickinson's Court. It is to be regretted that the government did not appeal his cited decision in order that a rule so fundamentally sound might have been affirmed at an earlier date.

There is good warrant for the application in the Philadelphia Storage Battery Company case of the nomenclature test to determine classification. In *Maillard vs. Lawrence*, 16 *How. (57 U. S.)* 251, the question was whether shawls were imported under that section of the tariff act imposing a duty on "wearing apparel" or under that section relating to "manufactures of silk, or of which silk shall be component material." The court held that the commonly accepted meanings of "shawls" and "wearing apparel" was too clear to permit of successful dispute and the circumstance that the shawls are sometimes used to be worked into vests cannot deprive them

of their character at the moment of importation as wearing apparel within the commonly accepted meaning of the term.

In *Chew Hing Lung & Co., vs. Wise*, 176 *U. S.* 156, the question was whether imported tapioca flour, being one of the three commercially known forms of tapioca, came within the classification "tapioca" on the free list, or constituted a "starch, including all preparations from whatever substance produced, fit for use as starch,". It was shown that tapioca flour could be used for starch, was used by Chinese laundrymen for this purpose and by calico manufacturers and carpet makers to thicken colors, and sometimes for sizing cotton goods. Chemically the article was a starch.

This court concluded that the article questioned was on the free list. The principal reason assigned was that tapioca flour was commercially known as "tapioca" and was not commercially known as starch nor any preparation fit for use as starch, and Congress must be judged to have used the term as it is used by those who regularly employed it in the commerce where it was used.

To the same effect see *Sonn vs. Magone*, 159 *U. S.* 417, where lentils and beans are classified as "vegetables" rather than as "seeds" because they are commonly regarded as vegetables although botanically they are seeds. In *DeJonge vs. Magone*, 159 *U. S.* 562, a product made of paper and other materials but known in the trade as "fancy paper" is, chiefly because of this commercial description, classified as "paper" rather than as a "manufacture of paper." See also *Hartranft vs. Meyer*, 149 *U.*

S. 544, where the question of whether "chinas" or "marcellines," used in the manufacture of hats, are "trimmings for hats" depends upon the natural use of the word "trimmings." Also *U. S. vs. Massachusetts General Hospital,* 100 *Fed.* 932, where it is determined that in normal understanding surgery is a science; hence surgical instruments are "scientific" instruments in the common use of the term.

The principle evolved in these cases clearly is that in fixing the intent of Congress as to whether an article should come within or without a tax imposed, either the trade, or common name, of the article, is determinative. So far as the case at bar is concerned, not only is there no trade term "automobile batteries" but there is no such popular combination of words. Electric storage batteries are sources of electric current. This meaning of the name was familiar to the layman long prior to the arrival of the automobile. The automotive industry has been far from absorbing these commercial commodities and thus causing any change in the words everywhere used to describe them.

Regardless of whether the commercial connotation, or the popular interpretation, be placed upon the terms employed, the phrase "automobile batteries" has no currency. Hence storage batteries are not parts or accessories for automobiles, automobile trucks and wagons or motor cycles any more than they are parts for many totally different things. It is submitted the Court below erred in not applying the accepted use of the nomenclature involved to determine the limits of tax classification.

The "Usage" Doctrine.

The decision below is in direct conflict with the "usage" doctrine developed by this Court to determine taxable classifications.

While we believe that this case would be properly decided upon the principle employed in *Philadelphia Storage Battery Company vs. U. S.*, 21 *Fed. (2nd)* 320, there is, upon the authority of the decisions of this Court, a doctrine affording even stronger support for the petitioner's contention. That rule, reduced to its essentials, is this:

> If the article in question is commonly, practically and generally used upon a given device it is a part or accessory of that device, *provided*, it is not commonly, practically and generally used for other purposes and in other devices.

See *Maillard vs. Lawrence*, 57 *U. S. (16 How.)* 251; *Hartranft vs. Langfeld*, 125 *U. S.* 128; *Worthington vs. Robbins*, 139 *U. S.* 337; *Cadwalader vs. Wanamaker*, 149 *U. S.* 532; *Walker vs. Seeberger*, 149 *U. S.* 541; *Hartranft vs. Meyer*, 149 *U. S.* 544; *Magone vs. Heller*, 150 *U. S.* 70; *Sonn vs. Magone*, 159 *U. S.* 417; *Magone vs. Weiderer*, 159 *U. S.* 555; *Atwater-Kent vs. U. S.*, 62 *Ct. Cls.* 419; *Milwaukee Motor Products Company vs. U. S.*, 66 *Ct. Cls.* 295; *Berg Brothers Manufacturing Company vs. U. S.*, 67 *Ct. Cls.* 165.

The historical development of the doctrine in this Court

is not difficult to trace even through its expression in varying forms such as "primal use," "predominant use," "chief use," etc.. As is to be expected, the decisions of this Court affecting the usage doctrine relate, with the exception of certain cases arising under the Munitions Tax Act of 1916, to disputes over the classification of articles and commodities under the tariff laws. Administratively, the problem in the case at bar is the same as in the tariff act decisions. That is to say, in the tariff cases the question is what is the exact character of the article at the moment it is imported: in the excise cases the question is what is the exact character of the article at the moment it is sold.

In *Maillard vs. Lawrence*, 16 *How. (57 U. S.)* 251, (Decided December Term 1853), there is an early, if not the first, resort to discovering the utility and function of an article in order to determine what it is. In that case the question was whether the tariff impost should be upon shawls and scarfs as "clothing ready made and wearing apparel of every description," or whether shawls and scarfs should be classified as "manufactures of silk or of which silk shall be component material * * *". The plaintiff advanced an argument that the articles were not wearing apparel because they were sometimes purchased by tailors and clothiers and worked up into vests and dressing gowns. Upon this contention Mr. Justice Daniel concludes:

> "This position might, with equal propriety be urged with reference to any article of wearing apparel whatsoever which should be diverted from

its *primal* and *regular use* and design." (Emphasis ours.)

The case may be said to stand for the proposition that the achieved character of an article is not to be altered by *occasional* devotion to other uses.

In *Hartranft vs. Langfeld*, 125 *U. S.* 128, (Decided March 19, 1888), the question was whether imported ribbons constituted "trimmings * * * used for making or ornamenting hats * * * " under a given tariff classification, or whether they were articles "made of silk or of which silk is the component material of chief value," under another classification. That the goods were "trimmings" there was no controversy, but the evidence was that while they were used for making or ornamenting hats, they were also used for trimming dresses. The importer requested that the jury be instructed:

> "I. That if the jury find the goods in question are used for making or ornamenting hats, their verdict should be for plaintiffs,"
>
> * * * * *
>
> "IV. That if the jury find the goods in question are known and used as hat trimmings, used for making or ornamenting hats, although they may be used from time to time for other purposes, their verdict should be for the plaintiffs."

The defendant (the Collector) asked for an instruction reading:

> "That unless the jury should find that the goods in question are not specifically provided for, and

> that by their style and character they are fitted only for use for making or ornamenting hats, then your verdict should be for the defendant."

The Court below avoided both Scylla and Charybdis, however, and instructed the jury in material part as follows:

> "It is the *use* to which these articles are *chiefly adapted*, and for which they are used, that determines their character within the meaning of this clause of the Tariff Act * * *. It is the *predominant use* to which articles are applied that determines their character * * *. You will, therefore, determine to which use these articles in question are chiefly devoted * * *. The question is simply and purely one of fact, namely, what is the *predominant use* to which these articles are devoted." (Emphasis ours.)

This Court affirmed the judgment of the Court below without citation of authority. The decision, however, is a direct development of the finding in *Maillard vs. Lawrence*, 16 *How. (57 U. S.)* 251, cited above, to the effect that it is the regular, practical and general use of the article as distinguished from occasional uses for other purposes that determines its character.

For the repeated decisions of this Court to the same effect as the foregoing *Hartranft vs. Langfeld*, and dealing with the same subject matter, see *Robertson vs. Edelhoff*, 132 *U. S.* 614; *Cadwalader vs. Wanamaker*, 149 *U. S.* 532; *Walker vs. Seeberger*, 149 *U. S.* 541; *and Hartranft vs. Meyer*, 149 *U. S.* 544.

In *Worthington vs. Robbins*, 139 *U. S.* 337, (Decided March 30, 1891), the converse of the rule in *Hartranft vs. Langfeld*, 125 *U. S.* 128, and the cases cited above which follow it, is declared on an article which had not yet reached that stage of development where its common, general, practical, predominant, or chief use, could be designated for a single purpose. In that case a substance known as "white hard enamel" was imported admittedly for use in surfaces of watch dials. Before, however, the material could be used for any practical purpose, it was necessary to grind and pulverize it and apply additional processes of manufacture. The form and condition of the merchandise as imported, afford no evidence or indication of the particular use to which it was to be applied.

The issue was whether the material was "watch materials" under the Tariff Act, or an article "manufactured in whole or in part, not herein enumerated or provided for."

Mr. Justice Blatchford, denying that the article was "watch materials" says that the article in question

> "is used for various purposes, including the making of faces or surfaces of watch-dials, scale-columns of thermometers, faces or surfaces of steam-guage dials, and for other purposes when a smooth or enameled surface is desired. It thus appears that it was not used exclusively for the making of faces or surfaces of watch-dials; and, although it is stated in the statement of agreed facts that the enamel in controversy was imported by the plaintiffs for use in making watch dials and was in fact

> so used, there was nothing to prevent them from selling it to persons who would use it for the other purposes for which it is stated it is used."

In this decision we have this Court refusing to accept the intent of the buyer of the article and his subsequent actual use of it, as determinative of the character of the article when it has not yet achieved characteristics which limit it to one use. In other words, neither intended nor actual future use will classify an article for that use alone when such an article commonly, generally and practically has uses for various purposes.

In October of 1893, the case of *Magone vs. Heller*, 150 *U. S.* 70, was decided by this Court. The question was whether material imported as "manure salts" came within the clause "potash, sulphate of" or "chemical products * * * expressly used for manure." The facts indicated that the article was in fact sulphate of potash, but that it was used for manure. The defendant collector moved the court below to allow the case to go to the jury upon the question of whether the article was a "substance expressly used for manure." The Court denied this motion and directed a verdict for the plaintiffs.

Mr. Justice Gray, announcing the decision of this Court that the question should have gone to the jury, declares:

> "If the only common use of a substance is to be made into manure, or to be itself spread upon the land as manure, the fact that occasionally, or by way of experiment, it is used for a different purpose, will not take it out of the exemption.

> But if it is *commonly, practically* and *profitably used* for a different purpose, it cannot be considered as "expressly used for manure," even if in the majority of instances it is so used." (Emphasis ours.)

Thus is the "usage" rule laid down in full maturity.

It remained only for the case of *Magone vs. Weiderer*, 159 *U. S.* 555, decided November 18, 1895, to make it definite and certain, that the developed rule announced in *Magone vs. Heller*, 150 *U. S.* 70, was the correct expression of the doctrine "where use becomes the criterion." In *Magone vs. Wiederer*, pieces of glass with beveled edges were imported. The importer claimed that they were "parts of clocks." The Collector claimed they were "articles of glass, cut, engraved." Evidence showed that the glass had been ordered from abroad, cut and manufactured to sizes suitable for clocks, and beveled so as to be ready for fitting into the frames of clocks, as a regular course of business, which had been continuing for some time, between the glass manufacturer and the importer. There was evidence tending to show that like pieces of glass were sometimes used by manufacturers of hand mirrors, carriage manufacturers, lamp makers and for other objects. The Collector, whose counsel apparently was not familiar with the decisions of this Court, requested the Court below, in substance, to find in favor of the Collector unless the evidence showed that the pieces of glass in controversy were used absolutely and exclusively for clocks and no other purpose. The Court, below, cognizant of the law as laid down by this Court, charged in part:

"The Supreme Court in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury 'that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute * * *.' And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they are articles, all, or one or more, as the case may be, which have no distinguishing characteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have *several uses to which they are perfectly applicable*, then as to those articles your verdict should be for the defendant." (Emphasis ours.)

Chief Justice White approves the charge given by the Court below and declares that the doctrine expressed in *Magone vs. Heller* was consistent with all the prior decisions of the Court and that the terms "*commonly, practically, and profitably used,*" are to serve as a guide as to what constitutes "chief use."

From the rule as stated in *Magone vs. Heller*, and thus

reaffirmed in *Magone vs. Wiederer*, this Court has never departed. The lower courts have repeatedly employed with success these principles in solving the questions which came before them. See, for example, *U. S. vs. Riga*, 171 *Fed.* 784; *U. S. vs. U. S. Express Co.*, 94 *Fed.* 642. These two decisions in the lower courts illustrate, in converse circumstances, the operation of the "usage" doctrine.

In *U. S. vs. U. S. Express Company*, 94 *Fed.* 642 (Circuit Court, S. D. N. Y.), the question was whether imported strips of pearl should be classified as "parts of knives wholly or partly manufactured" or "as manufactures of mother-of-pearl, not specially provided for." The United States contended that inasmuch as the pearl was shipped in certain sizes and its chief use was for knife handles that they were so classified. It appeared, however, that the articles were sold in all sizes and shapes and used on fans, opera glasses, button hook handles, cork screws, and other articles. The Court pointed out that in their condition when imported the strips of pearl were not necessarily a part of a knife handle and required further shaping for the purpose. Hence, they were nothing more than material from which pocket knives may be manufactured. The court declared that the principle in *Worthington vs. Robbins*, 139 *U. S.* 337, where "white hard enamel" had not attained a character where its chief use was for watches, clearly controlled. In other words, it could not be said that there was not for these strips of pearl at the moment of their importation, a common, general and practical use for other purposes than for parts

of pocket knives. The Court so decided.

In *U. S. vs. Riga*, 171 *Fed.* 783 (Circuit Court, D. Massachusetts) (Decided June 11, 1909), rough rifle barrel forgings were imported. The question was whether they should be classified as "manufactures of metal" or "rifles and parts thereof." The contention was that these forgings could not constitute parts of rifles until they were in a finished condition complete and ready for adjustment. The Court, quoting the Board of General Appraisers, pointed out that the forgings at the time they were imported, were "fit for no other useful purpose than as a part of a rifle." This finding obviously concluded the inquiry under the chief use doctrine. As distinguished from the "white hard enamel" in *Worthington vs. Robbins*, 139 *U. S.* 337, and *U. S. vs. U. S. Express Company*, 94 *Fed.* 642, where strips of pearl had not yet taken the peculiar characteristics required for pocket knife handles, the rough forged rifle barrels could not be used for any other practical use. Hence, it was inevitable that their common, practical, and general use must be for rifle barrels alone and that they were parts thereof.

By the year 1920 two cases had reached this court requiring interpretation of the Munitions Manufacturers' Tax Act of September 8, 1916. (39 Stat. L. 463, p. 781.) That act declared:

> "that every person manufacturing projectiles, shells, or torpedos * * * or any part of any of the articles mentioned * * * shall pay an excise tax * * * upon the entire net profits actually received or accrued * * * from the sale or disposition of such articles * * * ."

In *Worth Brothers Company vs. Lederer*, 251 *U. S.* 507, and in *Forged Steel Wheel Company vs. U. S.*, 251 *U. S.* 511, both decided on March 1, 1920, the questions raised were identical. In these cases certain principal contractors supplied finished explosive shells to the French and British governments respectively. It was the function of both plaintiffs to supply the rough forgings for shells in a condition to which the principal contractors could apply their manufacturing processes and finish the forgings as the completed article under the contract. Worth Brothers Company, before delivering the shells to its principal contractor, completed 6 of the successive manufacturing processes necessary to complete the shell.

> "the fifth took the fluid metal [the result of the second step] from the possibility of use for general commercial purposes, and by a forging process restricted the steel to the field of use for shells."

While this Court did not find it necessary so to say, there was unquestionably at this point the same factual situation disclosed in *U. S. vs. Riga*, 171 *Fed.* 783, where rough forged rifle barrels could be employed for no other practical purpose than completion as rifle barrels. Hence, the rule of chief use, i. e. that there was no common, general, or practical use to which these rough shell forgings could be devoted other than to completion, as finished shells, made them clearly and unmistakably parts of shells. As such parts of shells, the profit resulting from their sale was obviously taxable to the plaintiffs.

In the companion case of the *Forged Steel Wheel Com-*

pany, 251 *U. S.* 511, that subcontractor carried the forgings through to the point where there was a hollow steel body, or shell form, of a suitable composition, shape and length, from which to make the projectile contracted for. This was the equivalent to the sixth step performed by Worth Brothers Company under their contract. Hence, the forgings were necessarily brought to a point where they could be used for no other practical purpose than for completion of the finished shell called for in the principal contractor's agreement. Here again there was no common, practical, or general use for these forgings other than in steel shells, and under the chief use rule they were parts of such shells.

While in neither *Worth Brothers Company vs. Lederer*, 251 *U. S.* 507, nor *Forged Steel Wheel Company vs. Lewellyn*, 251 *U. S.* 511, did this Court see fit to decide the questions on the basis of the established chief use doctrine, it should be obvious that these cases could have been decided in the same manner upon this principle, and in every way consistently with the doctrine already developed by this court. A contrary decision would have been directly in conflict with the "usage" principle.

In *Dayton Brass Castings Company vs. Gilligan*, 267 *Fed.* 872 (U. S. District Court), decided September 23, 1920, an issue similar to that in *Worth Brothers Company vs. Lederer*, 251 *U. S.* 507, and *Forged Steel Wheel Company vs. Lewellyn*, 251 *U. S.* 511, was before the court. The question was whether a subcontractor who cast metal, furnished by the principal contractor, into rough castings and returned them to the principal contractor to

be finished for use in shell fuses, was the manufacturer of parts under the same Munitions Manufacturers' Tax Act of September 18, 1916. One inquiry was whether such forgings were parts. The Court found that while additional manufacturing processes had to be applied to the forgings furnished by the plaintiff as subcontractor, that nevertheless,

> "The articles produced by plaintiff by reason of peculiar characteristics (their form being one of them) lost their identity as commercial commodities and, without further treatment, could not be used for any purpose other than that for which they were respectively intended."

Hence the Court found that these forgings were parts.

Here again we have the operation of the rule of chief use. It is clear that as soon as the forgings in question reached the point where they had no other common, general and practical use as a commercial commodity than as parts of the projectile fuse in question, their chief use was for that purpose and they properly were parts of such a shell fuse.

So far as we are aware there are no later cases in this court upon the question of chief use than those discussed above, and we believe that all the decisions in this Court which have a material relation to the development of that doctrine have been discussed herein. We have found no inconsistency, conflict nor divergency among them and submit that the matured rule as laid down in *Magone vs. Heller*, 150 *U. S.* 70 and reaffirmed in *Magone vs. Wiederer*, 159 *U. S.* 555, is a correct statement of this principle.

The Application of the Usage Doctrine to the Decision Now Under Review.

We submit that the principle evolved by the Court below is in material conflict with the chief use rule.

In the opinion cited (*Cole Storage Battery Company vs. U. S.*, 65 *Ct. Cls.* 164) as the single authority for its decision the lower Court stresses the fact that the petitioner's storage battery was,

> "advertised as to meet the essential requirements of locomotive power"

and that the petitioner,

> "seeks the custom of the automobile trade, assures the latter of the especial qualities of his battery."

That the intentions of the seller, the intentions of the buyer, and even the actual use by the buyer, of the article in question, is immaterial in determining what the article is at the moment the duty attaches, is made clear in *Worthington vs. Robbins*, 139 *U. S.* 337 (Discussed at page 27 supra) where "white hard enamel" was held not to be "watch material" even though imported with the intention to use it on the face of watches and it was admitted that the material was actually so used. In *Magone vs. Wiederer*, 150 *U. S.* 555 (discussed at page 29 supra), the articles of glass in question were shown to have been imported, cut to size and ready for use as clock faces without further processing, by two clock manufac-

turing companies. Nevertheless this Court declared that the test of whether the articles were "parts of clocks" depended upon whether they had no other common, general, and practical use.

Hence, the fact that the manufacturer of storage batteries seeks the automobile industry as a market for his wares, and declares the effectiveness of his product for use in that industry, cannot destroy the common, general and practical use of his product in other industries, nor confine the product to use as a part of an automobile, automobile truck, automobile wagon, or motorcycle. At most, his sales efforts are but evidence of possible usage.

Again the Court of Claims implies that the petitioner's electric battery was

> "especially adapted for and so designed * * * as to meet the essential requirements of locomotive power."

In *Magone vs. Weiderer*, 159 *U. S.* 555 (as we have seen at pages 29-31 supra), the beveled glass in question was manufactured, according to the size specifications furnished by the importer, for use in making clocks. None the less, this Court specifically held that notwithstanding such design, adaptation and subsequent use, the jury must find, as a matter of fact, whether the articles are chiefly used as parts for clocks before the articles could be classified as "parts of clocks." In *Worthington vs. Robbins*, there is no doubt that the "white hard enamel" was designed and especially adapted to meet the essential requirement of watch face enamel. Nothing in

its design, however, confined it to that use.

Is it not clear from these decisions that even if batteries be specially designed for use in automobiles, since the same batteries are commonly, generally and practically used for various other purposes, they cannot be parts or accessories for automobiles?

The Court of Claims appears to put great weight on the fact that the accomplishment of the gasoline engine in an automobile is only obtainable with a storage battery and

"without its presence the mechanism is useless."

Was not a glass essential to the glass face of the clocks referred to in *Magone vs. Wiederer*, 159 *U. S.* 555? (See pages 29-31 supra). Was not the pearl essential to the pearl handled knife considered in *U. S. vs. U. S. Express Company*, 94 *Fed.* 642? (See pages 31-32 supra).

Can any signal system, railway switch, telephone, fire alarm, motor boat, farm tractor, radio, etc., etc., designed to operate with a storage battery furnishing current, operate when that battery is not functioning? Without arranging for another source of supply of the current required, could any of the devices in which a storage battery furnishes the power or current required, operate without the battery? A moment's consideration will show that the storage battery is just as essential to the operation of the many and various assemblies commonly, generally and practically designed to employ it as is the storage battery essential to the functioning of an automobile.

In the light of the doctrine of usage, as developed by this Court, we submit that the rule announced by the Court of Claims in *Cole Storage Battery Company vs. U. S.*, 65 *Ct. Cls.* 164, and cited as authority for the finding in the case at bar, is erroneous. Specifically, that pronouncement fails:

to give controlling weight to the common, practical and profitable use and sale of electric storage batteries for a number of purposes other than with the automotive vehicles designated in the statute;

to give adequate weight to the established character of the electric storage battery as a commercial commodity prior to the advent of the automobile;

to consider, as well as in the case of automobiles, the necessity of the electric storage battery to the functioning of any device depending upon it for a source of power;

to declare that to constitute electric storage batteries parts or accessories for the vehicles mentioned in the statute, the batteries must not only be designed and adapted for use in those automotive vehicles but the batteries must have no common, general and practical use on other devices.

(C) *Correct statutory interpretation demonstrates that the electric storage batteries sold by this petitioner were not parts or accessories for automobiles and the vehicles designated in the statute and that these batteries were not intended to be taxed.*

Since 1913 the petitioner has made and sold electric

storage batteries of the kind used long before the advent of the automobile in various mechanical devices requiring a readily accessible and dependable flow of electric current. These batteries are regularly sold for, and used in, signal apparatus, stationary gasoline engines, motor boats, tractors, lighting plants, airplanes, mining cars, railway switches, wireless, telephones, telegraph, radios, fire alarms, door bells, electro-plating machines, etc. These uses are not occasional only but are upon a commercial scale, profitable, practical and common. The sales taxed by the respondent were made to electric storage battery distributors, jobbers, garage men, accessory dealers and radio dealers. The petitioner could not know to what use its batteries would be put when sold by it.

The terminals on a battery determine the purpose for which the battery may be used. The petitioner did not manufacture such terminals and ninety-nine per cent of its product left its factory without any terminals, and with no knowledge in the petitioner as to what sort of terminals were going on its batteries after they were sold.

The Commissioner of Internal Revenue ruled that these electric storage batteries sold by the petitioner were "parts or accessories" for automobile trucks, automobile wagons, other automobiles, or motor cycles and that their sale to other than manufacturers, producers or importers of automobiles was taxable under Sections 900 of the Revenue Acts of 1918 and 1921. On this ruling he collected the taxes which are the subject of this suit.

The extended and broadly inclusive terms employed in the neighboring subsections of the taxing statute re-

strict the use of the phrase "parts and accessories" for automobiles, etc., to those articles which, strictly speaking, are parts or accessories of the vehicles designated in the statutes. If it had been intended to tax electric storage batteries which are used equally with other devices as they are with automobiles, etc., those devices themselves would have been taxed. If it had been intended to tax electric storage batteries they are of sufficient commercial importance to warrant specific designation in the statute in the same manner in which other articles are named.

Hence, it should be concluded that petitioner's electric storage batteries commercially used for many purposes other than for automobiles, etc., are not taxable as parts or accessories for automobiles and the vehicles named in the statute.

The petitioner's electric storage batteries are neither commercially nor commonly, in the ordinary use of the language, known as "automobile storage batteries." Hence, it cannot be properly implied that the term "parts or accessories" for automobiles, etc., includes these electric storage batteries. They were never intended to come within this taxing classification.

The petitioner's batteries were commonly, generally, practically and profitably sold for use in and actually used in many and various devices which were not automobiles, automobile trucks, automobile wagons or motor cycles. They were not limited to use in the vehicles named. Hence, they were not parts or accessories for these vehicles.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Claims should be reversed, and the cause remanded, with direction to enter judgment for your petitioner.

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APPENDIX

Revenue Act of 1918, *C.* 18, 40 *Stat,* 1057, *Title IX.—Excise Taxes*

SEC. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

(4) Pianos, organs (other than pipe organs), piano players, graphophones, phonographs. talking machines, music boxes, and records used in connection with any musical instrument, piano player, graphophone, phonograph, or talking machine, 5 per centum;

(5) Tennis rackets, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles and cushions, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and

goals, basket-ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games), and all similar articles commonly or commercially known as sporting goods, 10 per centum;

(6) Chewing gum or substitutes therefor, 3 per centum;

(7) Cameras, weighing not more than 100 pounds, 10 per centum;

(8) Photographic films and plates, other than moving-picture films, 5 per centum;

(9) Candy, 5 per centum;

(10) Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, or any foreign country while engaged against the German Government in the present war, 10 per centum;

(11) Hunting and bowie knives, 10 per centum;

(12) Dirk knives, daggers, sword canes, stillettos, and brass or metallic knuckles, 100 per centum;

(13) Portable electric fans, 5 per centum;

(14) Thermos and thermostatic bottles, carafes, jugs, or other thermostatic containers, 5 per centum;

(15) Cigar or cigarette holders and pipes, composed wholly or in part of meerschaum or amber, humidors, and smoking stands, 10 per centum;

(16) Automatic slot-device vending machines, 5 per centum, and automatic, slot-device weighing machines, 10 per centum; if the manufacturer, producer, or importer of any such machine operates it for profit, he shall pay

a tax in respect to each such machine put into operation equivalent to 5 per centum of its fair market value in the case of a vending machine, and 10 per centum of its fair market value in the case of a weighing machine;

(17) Liveries and livery boots and hats, 10 per centum;

(18) Hunting and shooting garments and riding habits, 10 per centum;

(19) Articles made of fur on the hide or pelt, or of which any such fur is the component material of chief value, 10 per centum;

(20) Yachts and motor boats not designed for trade, fishing, or national defense; and pleasure boats and pleasure canoes if sold for more than $15, 10 per centum; and

(21) Toilet soaps and toilet soap powders, 3 per centum.

If any manufacturer, producer, or importer of any of the articles enumerated in this section customarily sells such articles both at wholesale and at retail, the tax in the case of any article sold by him at retail shall be computed on the price for which like articles are sold by him at wholesale.

The taxes imposed by this section shall, in the case of any article in respect to which a corresponding tax is imposed by section 600 of the Revenue Act of 1917, be in lieu of such tax.

SEC. 907. (a) That on and after May 1, 1919, there shall be levied, assessed, collected and paid (in lieu of the taxes imposed by subdivisions (g) and (h) of section 600 of the Revenue Act of 1917) a tax of 1 cent for each 25 cents or fraction thereof of the amount paid for any of the following articles when sold by or for a dealer or his estate on or after such date for consumption or use:

(1) Perfumes, essences, extracts, toilet waters, cosmetics, petroleum jellies, hair oils, pomades, hair dressings,

hair restoratives, hair dyes, tooth and mouth washes, dentifrices, tooth pastes, aromatic cachous, toilet powders (other than soap powders), or any similar substance, article, or preparation by whatsoever name known or distinguished, any of the above which are used or applied or intended to be used or applied for toilet purposes;

(2) Pills, tablets, powders, tinctures, troches or lozenges, sirups, medicinal cordials or bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters (except those taxed under section 628 of this Act), essences, spirits, oils, and other medicinal preparations, compounds, or compositions (not including serums and antitoxins), upon the amount paid for any of the above as to which the manufacturer or producer claims to have any private formula, secret, or occult art for making or preparing the same, or has or claims to have any exclusive right or title to the making or preparing the same, or which are prepared, uttered, vended, or exposed for sale under any letters patent, or trade-mark, or which (if prepared by any formula, published or unpublished) are held out or recommended to the public by the makers, vendors, or proprietors thereof as proprietary medicines or medicinal proprietary articles or preparations, or as remedies or specifics for any disease, diseases, or affection whatever affecting the human or animal body: *Provided*, That the provisions of this section shall not apply to the sale of vaccines and bacterines which are not advertised to the general lay public, nor to the sale by a physician in personal attendance upon a patient of medicinal preparations not so advertised.

(b) The taxes imposed by this section shall be collected by whichever of the following methods the Commissioner may deem expedient: (1) by stamp affixed to such article by the vendor, the cost of which shall be rein-

bursed to the vendor by the purchaser; or (2) by payment to the vendor by the purchaser at the time of the sale, the taxes so collected being returned and paid to the United States by such vendor in the same manner as provided in section 502.

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 127

UNIVERSAL BATTERY COMPANY, PETITIONER,
v.
THE UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY TO RESPONDENT'S MOTION TO REMAND

STATEMENT

After this matter is in this Court upon the granting of the petitioner's application for a writ of certiorari to review the conclusion of law of the Court of Claims, and after the respondent has filed a brief in reply to the petitioner's specification of errors of law made below, the respondent

now files a motion that the cause be remanded to the Court of Claims to find further facts. The motion is in the alternative "in the event that this Court is of the opinion that the decision of the Court of Claims should not be affirmed upon the record as presented to this Court."

Respondent declares that the Court of Claims did not find relevant and material facts, in the record, as follows:

> "(1) That petitioner designed the batteries with respect to which excise taxes were paid for the special purpose of being used to replace a component part for automobiles;
>
> "(2) That petitioner's business policy was to cater to the needs of automobile and motor-truck owners for replacement batteries.
>
> "(3) That the term 'automobile storage battery' is used in trade parlance."

The petitioner begs leave to oppose this motion on the following grounds.

ARGUMENT

I

RESPONDENT'S MOTION SHOULD BE DENIED BECAUSE IT SEEKS REVIEW OF QUESTIONS OF FACT AND NOT OF LAW

The purpose of the rules of this Court (Rule 41) is to bring here from the Court of Claims for review nothing but questions of law. (*Lucken-*

back S. S. Co. v. *U. S.*, 272 U. S. 533.)

The respondent, after opposing the grant of certiorari, now, by recitation and citations from testimony not of record before this Court and even from the evidence in a case which is not before this Court, complains of the sufficiency of the findings below. This complaint is made notwithstanding the fact that the findings made below may fairly be said to be "direct, free from ambiguity, consistent, fully responsive to the issues, and contain nothing indicating that they or any of them are ill-founded in point of law." (*Luckenback S. S. Co.* v. *U. S.*, 272 U. S. 533.)

A very careful reading of respondent's motion fails to settle the question whether the respondent may not now be urging for the first time all, or some, of the complaints made against the Court of Claims' interpretation of the evidence below. In the absence of a demonstration that these specific objections to the evidence were presented to the Court below for correction, it is submitted that these contentions may not now be raised upon review. *U. S.* v. *James Driscoll*, 95 U. S. CLIX (24 L. ed. 596); *Mahan* v. *U. S.*, 14 Wall. (81 U. S. 109.)

If, on the other hand, the implication intended to be drawn from respondent's motion in the Court of Claims (quoted in full on pages 7 and 8 of the respondent's motion in this Court) is that respondent not only urged all these complaints in its exceptions filed to the report of the Commissioner of the Court of Claims, but again called the attention of that Court to them after the Court had announced its findings, adopting substantially

the Commissioner's report, the character of the respondent's present effort is exposed. The respondent is merely pressing for the third time interpretations of the evidence to which the Court of Claims, acting as a jury, could not assent.

Hence, either the respondent is now pressing upon appeal new matters not raised below, or respondent is asking this Court to review the evidence in two cases without the record in either before it, and decide whether such evidence warranted findings which the Court of Claims upon two occasions, apparently, has refused to reach. While the petitioner would have little to fear from the review of all the evidence in the two records cited in respondent's motion and could designate repeated and specific evidence below to support the rejection by the Court of Claims of the findings requested by the respondent, the process would place upon this Court the very burden which its rules are so obviously designed to avoid in these Court of Claims cases. If this Court would adhere to its established practice and avoid a precedent that the strategic maneuver for the respondent to a writ of certiorari is to secure a return of the case to the Court below in order that he may mend his hold, the respondent's motion should be denied.

II

NONE OF THE FINDINGS REQUESTED ARE MATERIAL TO THE CORRECT DECISION OF THIS CASE

A. With respect to the request that it be found that the petitioner catered to the needs of auto-

mobile and motor truck owners, the findings of fact of the Court of Claims to the effect that petitioner's storage batteries could be used on automobiles and were used on automobiles clearly carries the implication that the petitioner sought, along with other markets, the automobile trade. With the essence of this requested finding already in the record it is difficult to see what would be accomplished by remanding the case to include it merely in other terms.

B. With respect to the request that it be found that trade parlance includes the term "automobile storage battery" it should be perfectly clear from the findings of the Court of Claims that no such trade term, if it did exist, could be applied to the petitioner's batteries which were employed in such widely diversified uses as "motor boats, farm tractors, farm lighting plant, airplanes, for propelling mining cars, for propelling small trucks such as baggage trucks, for summer camp lighting, for door-bells, in railway switches and for wireless, and for other purposes where a dependable source of power is needed; also for radios, telephones, telegraph and fire alarms, and electroplating." Indeed the various uses of petitioner's batteries described in respondent's own motion (pp. 4 and 5) indicate why the Court of Claims refused to find the use in trade parlance of the term "automobile storage batteries" as having any relevancy to the petitioner's product. Even the respondent does not suggest that the trade term alleged to exist has any reference to petitioner's batteries. The respondent goes even further in the brief heretofore filed on the merits and some effort is

expended (pp. 11, 14, 15 of that brief) to show that the nomenclature of the trade is immaterial to this case.

In view of the inconsistency that would exist between the findings properly made by the Court below and the addition now proposed; in view of the absence of any indication, or allegation, that the term cited has any relevancy to the batteries here in question; and in view of the judicial determination in *Philadelphia Storage Battery Co.* v. *Lederer*, 21 F. (2nd) 320, that there is no such term as "automobile storage batteries" in the nomenclature of the trade, it is submitted that the remanding for the purpose of including the finding requested could result only in a finding which would be irrelevant to the issue or be inconsistent with the unchallenged findings already properly made in this case.

C. With respect to the respondent's request that it be found that petitioner designed its batteries for the special purpose of being used to replace a component part for automobiles, we resist the temptation to quote from the evidence below but not of record before this Court to demonstrate that this was not the fact. We, therefore, at once, submit that the presence, or absence, of this finding is immaterial.

As developed on pages 14 to 17 of the petitioner's brief heretofore filed in this case, the terms used in the taxing statute itself indicate that articles of the general commercial importance of storage batteries could hardly be included in "parts and accessories" when adequate terms for such inclusion were immediately at hand and

when articles of much less significance were specifically named in the statute. If this be correct, it is immaterial for what purpose the petitioner designed its batteries or with what intentions the petitioner sought their sale.

It is upon the respondent's own ground of "usage," however, that the immaterial character of the proposed finding may best be demonstrated. The rule of this Court we believe to be:

> If the article in question is commonly, practically and generally used upon a given device it is a part of that device, *provided*, it is not commonly, practically and generally used for other purposes and in other devices.

(See *Maillard* v. *Lawrence*, 57 U. S. (16 How.) 251; *Hartranft* v. *Langfeld*, 125 U. S. 128; *Worthington* v. *Robbins*, 139 U. S. 337; *Cadwalader* v. *Wanamaker*, 149 U. S. 532; *Walker* v. *Seeberger*, 149 U. S. 541; *Hartranft* v. *Meyer*, 149 U. S. 544; *Magone* v. *Heller*, 150 U. S. 70; *Sonn* v. *Magone*, 159 U. S. 417; *Magone* v. *Wiederer*, 159 U. S. 555.)

If this be a correct statement of the usage doctrine then, as soon as the Court of Claims found that the kind of batteries sold by the petitioner were used in "motor boats, farm tractors, farm lighting plants, airplanes, for propelling mining cars, for propelling small trucks such as baggage trucks, for summer-camp lighting, for door-bells, in railway switches and for wireless telegraphy, and for other purposes where a dependable source of power is needed; also for radios, telephones,

telegraph and fire alarms, and electroplating" and then, in addition to these facts, found that the petitioner "sells its batteries to garage men, accessory dealers, radio dealers, jobbers, and distributors, and has no means of knowing at the time of sale for what purposes its batteries will be used," the usage rule was satisfied and a finding for this petitioner was required.

That the identical argument, which the respondent now contends is material, has been considered by this Court and rejected because immaterial, appears in two of the decisions of this Court. In *Worthington* v. *Robbins*, 139 U. S. 337, the identical question of the importance of design, intended use and sale was before this Court. In that case a substance known as "white hard enamel" was imported admittedly intended and designed for use in surfaces of watch dials. Before, however, the material could be used for any practical purpose, it was necessary to grind and pulverize it and apply additional processes of manufacture. The form and condition of the merchandise as imported, afforded no evidence or indication of the particular use to which it was to be applied.

The issue was whether the material was "watch materials" under the Tariff Act, or an article "manufactured in whole or in part, not herein enumerated or provided for."

Mr. Justice Blatchford, denying that the article was "watch materials," says that the article in question

> "is used for various purposes, including the making of faces or surfaces of watch-

dials, scale-columns of thermometers, faces or surfaces of steam-gauge dials, and for other purposes when a smooth or enameled surface is desired. It thus appears that it was not used exclusively for the making of faces or surfaces of watch-dials; and, although it is stated in the statement of agreed facts that the enamel in controversy was imported by the plaintiffs for use in making watch dials and was in fact so used, there was nothing to prevent them from selling it to persons who would use it for the other purposes for which it is stated it is used."

In that case we have this Court disregarding design and intent of the seller and determining the question on the ground whether any common, general and profitable uses actually are made of the article for other purposes than the one in question. Where such various uses exist, there can be nothing in the design which restricts the article to a single use.

In *Magone* v. *Wiederer*, 159 U. S. 555, pieces of glass with beveled edges were imported. The importer claimed that they were "parts of clocks." The Collector claimed they were "articles of glass, cut, engraved." Evidence showed that the glass had been ordered from abroad, designed, cut and manufactured to sizes for the special purpose of being used for clocks, and beveled so as to be ready for fitting into the frames of clocks, as a regular course of business, which had been continuing for some time, between the glass manufacturer and the importer. There was evidence tending to show that like pieces of glass were sometimes used by

manufacturers of hand mirrors, carriage manufacturers, lamp makers and for other objects. The Collector requested the Court below, in substance, to find in favor of the Collector unless the evidence showed that the pieces of glass in controversy were used absolutely and exclusively for clocks and no other purpose. The Court, below, cognizant of the law as laid down by this Court, charged in part:

> "The Supreme Court in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury 'that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute * * *.' And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they are articles, all, or one or more, as the case may be, which have no distinguishing characteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have *several uses to which they are perfectly applicable*, then

as to those articles your verdict should be for the defendant." (Emphasis supplied.)

Chief Justice White's opinion approved that charge and declared that if the articles in question were "commonly, practically, and profitably used" for various other purposes they were not parts of clocks.

From these decisions it should be clear that the intentions of the seller and his efforts to reach a particular market are of no importance if the general market for the product is, in fact, a varied one. Design is of importance only if it be restrictive or limiting. That is, if the design restricts the article in question to use in a certain device, it is a part of that device: if the design is not restrictive and the article actually has common, practical and profitable uses other than in the one device, it is not a part of that device.

No suggestion is made by the respondent that the design of petitioner's batteries restricted them to use in automobiles. In fact when, in respondent's motion, counsel say "The same battery shown in the circular for automobiles can be used for farm light, radio, truck, tractor and telephone signal," they most effectively indicate that they advance no claim that the design of the petitioner's batteries was restrictive. At the same time they demonstrate clearly why the Court of Claims refused so to find. Without the restrictive feature, design is of no consequence. Hence, a remanding to the Court of Claims to assert an immaterial fact, even if the record would support such a finding, is an idle procedure.

CONCLUSION

Because the respondent is asking this Court to function in the burdensome manner which its rules directly seek to avoid; because the request of the respondent to remand, even if resulting in the findings requested by the respondent, would not materially affect the question before this Court; and because the findings of fact made by the Court of Claims are adequate, unambiguous, responsive to the issues, well founded in point of law, and affirmatively require a judgment for the petitioner; it is prayed that respondent's motion be denied.

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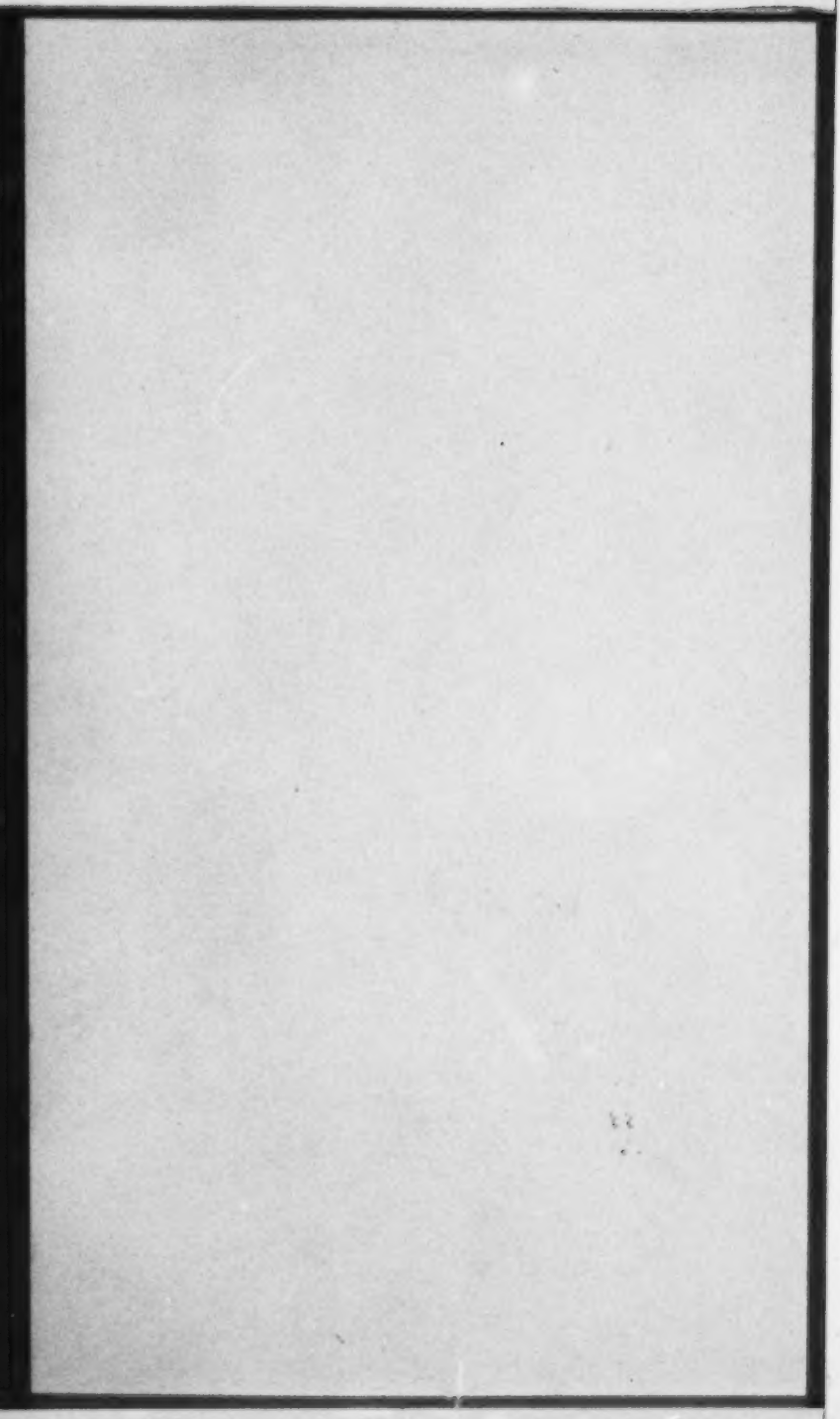

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No. 127

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNIVERSAL BATTERY COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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96794—29

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 127

UNIVERSAL BATTERY COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 17–25) is not yet officially reported.

JURISDICTION

The judgment sought to be reviewed was entered December 3, 1928. (R. 25, 26.) Motion for a new trial was overruled March 11, 1929. (R. 26.) Petition for writ of certiorari was filed June 4, 1929. (R. 26.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

THE QUESTION PRESENTED

Whether petitioner established in the court below that the electric storage batteries manufactured and sold by petitioner were not "parts or accessories for" automobile trucks, automobile wagons, other automobiles or motor cycles within the meaning of Section 900(3) of the Revenue Acts of 1918 and 1921, and of the Regulations of the Commissioner of Internal Revenue made by authority of said Acts, so as not to be taxable thereunder.

STATUTES INVOLVED

Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1122, as far as applicable:

> That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> (1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motor cycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories, for any of the articles numerated in subdivision (1) or (2), sold to any person other

than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum; * * *.

Section 900 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 291, in substance follows Section 900 of the Act of 1918.

REGULATIONS OF THE COMMISSIONER OF INTERNAL REVENUE

Article 14 of Regulations Number 47 (revised December, 1920), promulgated by the Commissioner and approved by the Secretary of the Treasury, is in part as follows:

Tires, inner tubes, parts, and accessories sold to manufacturers.—The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as "tires, inner tubes, parts, or accessories," and shall not be understood to embrace raw materials used in the manufacture of such articles.

Unvulcanized sheet rubber, liquid rubber vulcanizing cement, and friction fabrics are considered raw materials, and are exempt from tax.

Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or

producer, is subject to tax as a "part or accessory." * * *

Article 15 is in part as follows:

Definition of parts.—A "part" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

The term includes bodies, wheels, engines, springs, axles, radiators, etc. When sold separately a side car and a so-called trailer or "semitrailer" so designed that a portion of the load or the weight thereof is carried or borne by the tractor or "semitractor," are taxable as "parts."

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicle.

Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of

manufacture that they are primarily adapted for use as a component part. * * *

Article 16 contains the following provisions:

Definition of accessories.—An "accessory" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

The term "accessories" includes, for example, automobile tops, back and side curtains, horns, speedometers, self-starters, spot lights, shock absorbers, tire pumps, pressure gauges, and hydrometers.

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motorcycles are not subject to tax as "parts" or "accessories." Thus a wrench or other tool of a kind ordinarily sold in hardware stores for general purposes is not subject to tax when sold separately, but if incorporated in an automobile tool kit, designed, intended, advertised, or held out for use on an automobile as distinguished from garage or shop equipment, is taxable as part of the complete kit.

A wrench or other tool of special design or construction primarily adapted for use in connection with automobiles is taxable.

If any doubt exists as to the special adaptability of any article, the fact of its sale by the manufacturer to be used with an automobile, or to an automobile accessories dealer, would determine its taxability.

Robes, goggles, and lunch kits are not subject to tax. Asbestos brake band linings, generator tubing, and radiator hose are not subject to tax unless sold in prepared sizes, lengths, shapes, or with such fittings as make them adapted for use only on or in connection with automobiles.

Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motorcycles primarily adapted for use on or in connection therewith when sold for any other purpose are not taxable provided the purchaser files with his order a statement that such parts or accessories are to be used on or in connection with another article of commerce not enumerated or included in subdivisions (1), (2), or (3) of Section 900. * * *

STATEMENT

The petitioner sued in the Court of Claims to recover excise taxes in the sum of $27,841.35, plus interest and penalties, assessed against it with respect to completed storage batteries manufactured and sold by it to persons other than manufacturers of automobiles and motor cycles during the period extending from March, 1919, to September, 1923. (R. 13, 18–21.) The petitioner had filed with the Commissioner of Internal Revenue a claim for re-

fund of the taxes in question. The Commissioner granted a refund on account of battery parts sold separately, but rejected the claim on account of completed storage batteries. (R. 24, 25.) The Court of Claims entered judgment for the United States sustaining the tax. (R. 25.)

Its findings show that petitioner is a corporation organized and engaged in business under the laws of the State of Illinois, its business being the manufacture and sale of storage batteries and storage-battery parts. (R. 17.) The function of a storage battery in an internal-combustion engine is to produce a spark to set the mixture afire. In an automobile propelled by an internal-combustion engine the battery may also furnish current to light the car and start the engine. (R. 22.) For the past twenty years storage batteries such as were manufactured by the petitioner have been used in electric automobiles, gasoline-propelled automobiles, motor boats, farm tractors, farm lighting plants, aeroplanes, and for propelling mining cars and small baggage trucks, in summer camp lighting equipment, and for operating door bells, railway switches, wireless telegraph, radio, telephone, telegraph, fire alarm and electroplating apparatus. The petitioner sold its batteries to garage men, accessory dealers, radio dealers, jobbers, and distributors, and had no means of knowing at the time of sale for what purpose its batteries would be used. (R. 23.) Automobile manufacturers as a rule equip their cars with standard batteries. Petitioner man-

ufactured several types of batteries. Any one of them could be used in some automobile. The different types have order numbers. No battery was made to fit any particular automobile unless specially ordered. (R. 24.)

ARGUMENT

The court below decided this case without opinion on the sole authority of *Cole Storage Battery Company* v. *United States*, 65 C. Cls. 164 (certiorari denied, 278 U. S. 641). (R. 25.)

As the two cases deal with the same identical subject matter, namely, excise taxes on storage batteries collected under authority of the same statute and section, the court's conclusion of law sustaining the tax obviously rests upon the basis that the material facts in the two cases are similar.

The case of *Vesta Battery Corporation* v. *United States*, now pending in this Court on petition for writ of certiorari (No. 275) was decided by the Court of Claims against the plaintiff in the same manner as the instant case on the sole authority of *Cole Storage Battery Company* v. *United States* (No. 275, R. 28). The findings of fact in the *Vesta Battery Corporation case* are similar in all material respects to those of the *Cole Storage Battery case*, cited by the court. It is a reasonable inference that the court below was satisfied that there was such a similarity of facts between the instant case and the *Cole Battery case* as to justify the application of the latter as the one decisive

authority in the instant case. Indeed, the analogy of the two cases must have been as clear in the court's mind as if there were before it a stipulation of counsel that the testimony taken in the *Cole case* should be considered as a portion of the testimony in this case.

In the instant case, however, the findings are meager and neutral compared with those in the *Cole Battery* and the *Vesta Battery cases*. On many salient points the findings are silent. Petitioner's brief (pp. 19–20) adroitly takes advantage of these lacunae in the findings to distinguish this case from the *Cole Battery case*. It is embarrassing to the respondent not to be able to refer to findings, which if complete would, it is believed, not leave the slightest doubt that *Cole Battery Company* v. *United States* was an apt and controlling citation, and that the decision of the lower court in the instant case was sound and right. However, the special findings do show affirmatively that the petitioner sells its batteries to garage men, accessory dealers, radio dealers, jobbers, and distributors; that automobile manufacturers as a rule equip their cars with standard batteries (Finding IX); that petitioner manufactures several types of batteries; that any one of them could be used in some automobile; that the different types have order numbers (Finding X).

The mere absence in the special findings in the instant case of what petitioner calls "the determinative facts" in the special findings in the *Cole Battery case* does not establish the petitioner's cause of

action against the United States. The burden was on the petitioner to prove in the Court of Claims the facts establishing the invalidity of the tax. *United States* v. *Anderson,* 269 U. S. 422, 443. There is not a single affirmative finding of fact of the court below inconsistent with the taxability of the sales made by petitioner. Apparently sensing this lack, and in an effort to cover it, petitioner's brief (p. 3) concludes a summary of the court's findings with this sentence:

> It does not appear that the petitioner's batteries were especially designed or primarily adapted for use on any of the vehicles designated in the taxing statute.

Assuming, without conceding, that this inference of counsel is correct, we submit that this mere negative inference does not sustain the burden of proof which was on the plaintiff. *Botany Worsted Mills* v. *United States,* 278 U. S. 282, 290.

That "parts" and "accessories for" automobiles are correctly defined in Articles 14, 15, and 16 of the Regulations of the Commissioner of Internal Revenue (*supra,* pp. 3–6) is not disputed. It is evident that the Commissioner, as shown by his Regulations, did not assume any right to tax storage batteries as such. So the petitioner's case is that its storage batteries do not come within the terms of the definition of "parts" or "accessories for" automobiles and that, applying the legal criteria to the facts as alleged, no tax is assessable. (R. 10, 11.)

The legal criteria are unchallenged; only questions of fact remain to be determined.

The decision which this Court is asked to review was specifically based upon the decision of *Cole Storage Battery Company* v. *United States*, 65 C. Cls. 164, certiorari denied, 278 U. S. 641. In the opinion in the *Cole case*, the Court of Claims said (65 C. Cls., at p. 170):

> We hardly think it essential to enter upon a scientific résumé of the origin and detail construction of storage batteries and manner of functioning. It is not denied, and obviously is incapable of disputation, that an automobile so far as locomotion is concerned, if operated by a gasoline engine, would be a more than useless device without a storage battery. This case in our opinion turns upon the restricted issue as to whether a storage battery, especially adapted for and so designed and advertised as to meet the essential requirements of locomotive power, is a part or accessory of an automobile. The fact that a storage battery is available for use for a number of purposes other than for an automobile, or, that its creation antedated the invention of the automobile, is not determinate of the issue. A variety of parts of an automobile are susceptible of use in other devices, and other parts, both as to form and functioning elements, existed long prior to the coming of the automobile itself. What seems to us to turn the contention is the fact that in a combination of various

> elements to function in a certain way the accomplishment of the purpose is only attainable where a gasoline engine is used by coupling certain elements up with a storage battery, and without its presence the mechanism is useless. We think, therefore, that where a manufacturer of storage batteries seeks the custom of the automobile trade, assures the latter of the especial qualities of his battery and designs it as part of the automobile into which it is to be introduced, Congress intended by the taxing act to reach it as a source of revenue. The commissioner is careful not to tax storage batteries as such, and adopts a method of procedure which reaches only those as described in the findings.

Manifestly the Court of Claims must have been satisfied that the facts in the instant case justified the application of the *Cole case* as an authority.

CONCLUSION

No new or important question of general law is presented by this case. This Court has in three recent instances denied certiorari where the same statute and section were involved. (*Walker Manufacturing Company* v. *United States*, 65 C. Cls. 394, 278 U. S. 617; *Cole Storage Battery Company* v. *United States*, 65 C. Cls. 164, 278 U. S. 641; *Advance Automobile Accessories Corporation* v. *United States*, decided by Court of Claims October 22, 1928, but not yet reported, certiorari denied May 13, 1929.) The tax on automobile accessories was

repealed in 1926. We submit that the judgment below was correct, and the petition for writ of certiorari should be denied.

Respectfully submitted.

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AUGUST, 1929.

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JAN 9 1
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Nos. 127, 275, 350, 351, and 352

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNIVERSAL BATTERY COMPANY, PETITIONER
v.
THE UNITED STATES

VESTA BATTERY CORPORATION, PETITIONER
v.
THE UNITED STATES

THE BARRICK MANUFACTURING COMPANY, PETITIONER
v.
THE UNITED STATES

F. W. STEWART MANUFACTURING CORPORATION, PETITIONER
v.
THE UNITED STATES

GEMCO MANUFACTURING COMPANY, PETITIONER
v.
THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 127

UNIVERSAL BATTERY COMPANY, PETITIONER

v.

THE UNITED STATES

No. 275

VESTA BATTERY CORPORATION, PETITIONER

v.

THE UNITED STATES

No. 350

BASSICK MANUFACTURING COMPANY, PETITIONER

v.

THE UNITED STATES

No. 351

F. W. STEWART MANUFACTURING CORPORATION, PETITIONER

v.

THE UNITED STATES

No. 352

GEMCO MANUFACTURING COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims are not yet officially reported but appear in the records of the various cases as follows:

No. 127. Universal Battery Company. (R. 17–25.)

No. 275. Vesta Battery Corporation. (R. 19–28.)

No. 350. Bassick Manufacturing Company. (R. 9–14.)

No. 351. F. W. Stewart Manufacturing Corporation. (R. 11–13.)

No. 352. Gemco Manufacturing Company. (R. 8–9.)

JURISDICTION

The judgments by the Court of Claims were entered and writs of certiorari were granted as follows:

No. 127. Universal Battery Company; judgment entered December 3, 1928 (R. 25–26); motion for new trial overruled March 11, 1929 (R. 26); petition for certiorari filed June 4, 1929 (R. 26), and granted October 14, 1929.

No. 275. Vesta Battery Corporation; judgment entered May 6, 1929 (R. 28); petition for certiorari filed July 30, 1929 (R. 28), and granted October 21, 1929.

No. 350. Bassick Manufacturing Company; judgment entered June 10, 1929 (R. 14); petition for certiorari filed August 29, 1929 (R. 15); certiorari granted November 4, 1929.

No. 351. F. W. Stewart Manufacturing Corporation; judgment entered March 11, 1929 (R. 13); motion for new trial overruled June 3, 1929 (R. 13); petition for certiorari filed August 29, 1929 (R. 14), and granted November 4, 1929.

No. 352. Gemco Manufacturing Company; judgment entered March 11, 1929 (R. 9); motion for new trial overruled June 10, 1929 (R. 10); petition for certiorari filed August 29, 1929 (R. 10), and granted November 4, 1929.

The writ of certiorari in each of the above cases was granted by this Court under the provisions of Section 3 (b) of the Act of February 13, 1925, and the Court has ordered that all of these cases be argued as one case.

QUESTION PRESENTED

Do the findings of the Court of Claims show that the articles involved in the several suits, which were manufactured and sold by petitioners, were not "parts or accessories" for automobile trucks, automobile wagons, other automobiles or motor cycles within the meaning of Section 900 (3), p. 22, *infra*, of the Revenue Acts of 1918 and 1921, and of the regulations of the Commissioner of Internal Revenue made by authority of said Acts?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in an appendix to this brief.

STATEMENT

All of these cases were brought against the United States to recover Federal excise taxes assessed and collected under the provisions of Section

900 (3) of the Revenue Acts of 1918 and/or 1921. In all the Court of Claims rendered judgment sustaining the tax.

No. 127. Universal Battery Company

The following is an epitome of the findings of the Court of Claims:

The petitioner has since 1913 manufactured and sold storage batteries and storage battery parts. (R. 17.) In constructing a storage battery, a top is put on the container or jar and sealed over with sealing wax, leaving a terminal post exposed. The function of a storage battery in an internal-combustion engine is to furnish, in connection with an ignition system, the spark to set afire the mixture of gas. In an automobile the battery may also be used to furnish current to light the car and start the engine. (R. 22.) For the past twenty years storage batteries such as are manufactured by petitioner have been used in electric automobiles, gasoline-propelled automobiles, motor boats, farm tractors, farm-lighting plants, airplanes, for propelling mining cars, for propelling small trucks such as baggage trucks, for summer-camp lighting, for door bells, in railway switches and for wireless telegraphy, and for other purposes where a dependable source of power is needed; also for radios, telephones, telegraph, and fire alarms, and electroplating. Petitioner sold its batteries to garage men, accessory dealers, radio dealers, jobbers, and

distributors, and had no means of knowing at the time of sale for what purpose they would be used. (R. 23.)

Petitioner manufactured several types of batteries. Any one of them could be used in some automobile. No battery was made to fit any particular automobile unless specially ordered. The different types have order numbers. The arrangement of the cells of some types of petitioner's batteries may limit them to a particular make of automobile, but would not limit them for other uses. Almost all of the batteries left the factory with straight terminal posts without terminals. (R. 24.)

No. 275. Vesta Battery Corporation

In the findings of fact, the composition and construction of a storage battery are described and the various uses that may be made of storage batteries are enumerated, substantially as in the case of *Universal Storage Battery, supra.* (R. 26–27.) Petitioner sold batteries principally to dealers and jobbers who were conducting garages and service stations, and the batteries taxed "were of the type especially suitable for use on automobiles as replacements for the batteries forming a part of the original equipment of such cars and were not adapted to any other primary purpose or use." Catalogues issued advertised the batteries for use in automobiles and announced "A Vesta Battery for every car," and purchasers were requested in

ordering to specify the kind of automobile for which the battery was required. Any one of the types manufactured by petitioner could be used on some automobile. (R. 27–28.)

No. 350. Bassick Manufacturing Company

In this case the taxes were assessed and paid on the sale of gascolators. (R. 8.) A gascolator is a device designed to be placed between the fuel tank and the carburetor of any internal combustion motor for the purpose of taking out dirt, water, grit, or any foreign matter from the gasoline before it gets to the carburetor. They were sold by petitioner, during the period involved, to aeroplane, farm implement, automobile and industrial machinery manufacturers. They were adaptable for use on internal combustion engines used for driving tractors, airplanes, industrial machinery, motor boats, marine boats, and automobiles. (R. 10.) In November, 1926 (after the period of taxation in question), petitioner issued a catalogue advertising a "Ford gascolator," a "Franklin gascolator," and a special "Buick gascolator." It does not appear what, if any, part of the taxes sought to be recovered herein was paid for gascolators sold to automobile manufacturers or for uses other than for automobiles. (R. 11.)

No. 351. F. W. Stewart Manufacturing Corporation

The taxes were assessed and paid on the sale of parts for automobile speedometers, particularly

speedometer gears, drive chains, flexible shafts, and flexible housings for such shafts. (R. 11.) These articles "were especially designed, manufactured, and sold for use on or in connection with automobiles and are not adapted to any other purpose or use." (R. 11, 12.)

No. 352. Gemco Manufacturing Company

The taxes were assessed and paid on the sale of bumpers for automobiles, and bars, brackets, and fittings for use as replacement parts of such bumpers. Said articles were "especially designed, manufactured, and sold for use on or in connection with automobiles, and are not adapted for any other purpose or use." (R. 8.)

SUMMARY OF ARGUMENT

The assessment of the Commissioner is *prima facie* evidence of the correctness of the tax. The burden of showing that the tax was illegally collected was upon petitioners. No petitioner can recover unless some finding of the Court of Claims would support a judgment in its favor.

Two phases of the general question are presented. In Nos. 127, 275, and 350, the question is whether the findings show the article involved is not taxable, within a proper construction of Section 900 (3) of the Revenue Acts of 1918 and 1921. The other phase is whether a part of an accessory or of a part for an automobile is within the scope of the provision imposing the tax.

The tax is of the nature of a consumption tax. In the case of an article that is commonly used on automobiles but is also used for other purposes, the application of the tax depends upon the use to which the article is put, as determined by the design and the purpose for which it is advertised and sold. The statute has been so construed by the Treasury Department in Regulations 47, Arts. 15 and 16, during a period of six years. In this time the law was reenacted twice without material change, so that the Treasury Department construction has been impliedly approved by Congress. This construction is reasonable, and has been adopted by the Court of Claims. Rules of construction may not be carried so far as to reduce a statute to empty declarations.

Parts of accessories are taxable, since every element in the aggregation or composition or amalgamation of an article is a part of it.

Applying these principles to the findings in each of the present cases, the judgment of the Court of Claims in each case should be affirmed.

ARGUMENT

Paragraph (3) of Section 900, p. 22, *infra,* imposes a tax on the sale of parts or accessories for any of the articles enumerated in paragraphs (1) or (2), automobile trucks, automobile wagons, other automobiles, and motor cycles, except tractors, when sold to others than a manufacturer

or producer. The question in each of these cases is whether the findings of the Court of Claims show that the article involved was not a part or accessory for one of the articles mentioned, within the meaning of said section.

The assessment of the Commissioner is *prima facie* evidence of its correctness. See *Wickwire* v. *Reinecke,* 275 U. S. 101, 105; *United States* v. *Rindskopf,* 105 U. S. 418, 422. The burden of showing that any tax was illegally collected was upon petitioner. *Reinecke* v. *Spaulding,* decided by the United States Supreme Court January 6, 1930, No. 59, October term, 1929 (not yet reported); *Botany Mills* v. *United States,* 278 U. S. 282, 289–290; *United States* v. *Mitchell,* 271 U. S. 9, 12; *United States* v. *Anderson,* 269 U. S. 422, 443. In a case coming from the Court of Claims we submit that the petitioner can not recover unless some finding of the Court of Claims would require a judgment in his favor. See *Botany Worsted Mills* v. *United States,* 278 U. S. 282, 290, *supra; Reinecke* v. *Gardner,* 277 U. S. 239, 245. We contend that no finding of the Court of Claims in any of these cases requires a judgment in favor of the petitioner.

Two phases of the general question are involved in the present cases. Two of them relate to taxes assessed and collected on sales of storage batteries, No. 127, *Universal Battery Co.;* No. 275, *Vesta Battery Corporation.* One relates to taxes on

sales of an article called a gascolator, No. 350, *Bassick Manufacturing Co.* The question in each of these cases is whether the facts show that the article is within the scope of the language of the statute, on principles which will be referred to below.

The other phase of the question is presented by No. 351, *F. W. Stewart Manufacturing Corporation,* and No. 352, *Gemco Manufacturing Co.* The former relates to sales of parts for automobile speedometers; the latter to sales of parts of bumpers. Speedometers and bumpers are conceded to be accessories for automobiles, but it is contended by the petitioner in each of these two cases that parts for speedometers and parts for bumpers are not parts for automobiles, and that the statute does not cover parts for accessories.

The provisions imposing this tax are a part of Title IX of the Revenue Act of 1918, and of Title IX of the Revenue Act of 1921. An examination of this Title reveals an intention of Congress to levy taxes on the sale of articles that are not necessities, or on articles which are devoted to particular uses. They are consumption taxes. They were a part of the general program for raising revenue to defray the expenses of the Government in the war period. In taxing automobiles, tractors are expressly excepted. Parts or accessories for motor vehicles of the kinds enumerated are taxed, but parts or accessories for tractors are left free from tax. There are many articles which are component parts or

accessories of automobiles which could also be used as parts for tractors or for other purposes, such as for airplanes, motor boats, motor fire engines, and stationary engines. It is this situation which has given rise to much of the controversy over the application of the section. But it seems plain that so far as such articles are concerned, it was the intention of Congress that the *use* to which an article was to be put was to determine its taxability. It is not reasonable to suppose that no tax was to be levied on the sale of a storage battery (which is an indispensable part of an automobile) when sold for use in an automobile, merely because its use is not limited to automobiles.

To enumerate the various parts of or accessories for automobiles would have been well-nigh impossible and practically futile, as changes and improvements are being made constantly and new or different accessories are being devised. Many of the parts and accessories of motor cars are well-known devices which were in use before the advent of automobiles, and represent long-known principles applied particularly in automobile construction. Therefore, Congress used generic terms with the intention that the provision would be construed to effectuate its purpose.

The Treasury Department promulgated regulations which were designed to give effect to the intention of Congress and to resolve the difficulties in administering the law. (These regulations ap-

pear on pp. 23–24, *infra*.) We submit that these regulations reasonably interpret and apply the law. They were first promulgated May 1, 1919, and were continued without substantial change until the repeal of the provisions by the Revenue Act of 1926, c. 27, 44 Stat. 9. During this time the Revenue Acts of 1921 and 1924 were enacted without material change. The interpretation of the Treasury Department has thus been impliedly recognized and approved by Congress. *Heiner* v. *Colonial Trust Co.*, 275 U. S. 232, 235; *National Lead Co.* v. *United States*, 252 U. S. 140, 146.

Under the regulations as construed by the Court of Claims the following principles have been evolved:

(1) If an article is designed or sold primarily for use on automobiles, it is taxable.

(2) If an article is not designed or sold primarily for use on automobiles, it is not taxable.

(3) Even though an article was designed for use on automobiles, any of such articles proved to have been used for other purposes are not taxed.

(4) If an article is designed primarily for use on automobiles, the fact that it is susceptible of other uses does not relieve it of the tax.

(5) Component parts of an article which is taxable under the definitions of "parts or accessories" are taxable under the definition when sold separately if they have reached such a stage of manufacture that they are primarily adapted for use as a component part of such article.

(6) When an article is one that is commonly used on automobiles, and the tax has been collected thereon, it may not be recovered unless the taxpayer establishes that the article was not designed or sold primarily for use on automobiles.

Regulations No. 47, Arts. 15 and 16; *Cole Storage Battery Co.* v. *United States,* 65 C. Cls. 164, certiorari denied 278 U. S. 641; *Walker Manufacturing Co.* v. *United States,* 65 C. Cls. 394; *Advance Automobile Accessories Corp.* v. *United States,* 66 C. Cls. 304; *Atwater Kent Mfg. Co.* v. *United States,* 62 C. Cls. 419; *Borg & Beck Co.* v. *United States* (C. Cls.), decided March 11, 1929, not yet reported.

The instant cases are the first under this provision of the Revenue Act to come before this Court. A somewhat similar question has arisen with respect to the classification of articles under the Tariff Acts. *Chew Hing Lung* v. *Wise, Collector,* 176 U. S. 156; *Magone* v. *Wiederer,* 159 U. S. 555; *Sonn* v. *Magone,* 159 U. S. 417; *Magone* v. *Heller,* 150 U. S. 70. These cases lay down the rule that the commercial designation is the important one to be ascertained in settling the meaning and application of the tariff laws, but if the commercial designation fails to give an article its proper place in the classifications of the law, then resort must be had to the common designation. They also state that the classification is to be determined from the "chief use," which is to be ascertained by that which was commonly, practically, and generally

done, and is not to be overthrown by an occasional exception. We submit that these cases do not support the construction of the Acts here involved for which the petitioner contends. Moreover, we contend that those cases are not controlling in construing Section 900, *infra*. See *Forged Steel Wheel Co.* v. *Lewellyn*, 251 U. S. 511, 515. They deal with a different law, enacted with a different purpose in mind, viz., the protection of American industries. *Chew Hing Lung* v. *Wise, Collector, supra*, p. 163. As stated above, the tax here in question is of the nature of a consumption tax. Furthermore, those cases generally deal with articles *eo nomine*, while here we are considering generic terms, limited by a specification of the use, viz., for automobiles and motor cycles.

In *Philadelphia Storage Battery Co.* v. *Lederer*, 21 F. (2d) 320 (relied upon by counsel for the Universal Battery Company), the United States District Court for the Eastern District of Pennsylvania passed upon the application of the tax to sales of storage batteries. The District Court found (p. 323) that there is no such thing as an "automobile storage battery" or "storage battery for automobiles" in the nomenclature of the trade and no article or thing so known; that what were sold were "storage batteries," and these are not taxed by the Act. We submit that that court construed the section incorrectly. No parts or accessories are specifically named by Section 900, except tires and

inner tubes. Storage batteries are now an essential and indispensable part of an automobile. We submit that if a storage battery is designed for use in an automobile, and is sold as suitable and intended for such use, the sale is taxable.

Unless the law is so applied, there are but few parts or accessories of automobiles that would be reached by this tax. Almost every part of the motor of an automobile could also be a part of any internal combustion engine used for another purpose, such as tractors, motor boats, and pumps. It was the undoubted intention of Congress to tax the sale of all articles that were to be used as parts or accessories of automobiles. The construction contended for by the petitioners would largely nullify the Act. Rules of construction can not be carried to the length of reducing a statute to empty declarations. *Carbon Steel Co.* v. *Lewellyn* (C. C. A. 3d), 258 Fed. 533; 251 U. S. 501; *Worth Bros. Co.* v. *Lederer,* 251 U. S. 507.

On the question of the application of the tax to parts of parts or parts of accessories, this Court has held in construing another law that every element in the aggregation or composition or amalgamation of an article was a part of it. *Worth Bros. Co.* v. *Lederer, supra; Forged Steel Wheel Co.* v. *Lewellyn,* 251 U. S. 511. Those cases arose under the Munitions Tax Act of 1916, c. 463, 39 Stat. 756, 781, which imposed a tax upon profits received from the manufacture of certain articles "or any part of any of the articles mentioned." The contention of

the petitioners in each of those cases was much the same as the contentions of the petitioners here in the *Gemco* and *Stewart cases,* Nos. 351 and 352. They contended that steel forgings for shell bodies were not any part of a shell within the meaning of the law; that the words "any part" meant a substantially finished part, a part which has a relation "to the whole structure and to the purpose it is intended to subserve." In rejecting the contention, this Court said that Congress did not intend to subject its legislation to such artificialties and make it depend upon distinctions so refined. *Worth Bros. Co.* v. *Lederer, supra* (pp. 509–510).

We consequently submit that the regulation which provides—

> Component parts of articles taxable under the definition of "parts" are taxable when sold separately if they have reached such a stage of manufacture that they are primarily adapted for use as component parts—

was proper (p. 25, *infra*).

The facts in each of the present cases will be considered in the light of the principles referred to above.

No. 127. Universal Battery Company

In this case, the facts show that the petitioner was a manufacturer of storage batteries; that such batteries have many uses, including automobiles, trucks, and motor cycles; and that storage batteries are a common and usual part of an automobile. The tax was upheld by the Court of

Claims on the authority of *Cole Storage Battery Co., supra.* The findings in the present case are not as complete as the findings in the *Cole Storage Battery Co. case,* where it appeared that the batteries manufactured and sold were designed for the special purpose of being used to replace component parts of automobiles. The findings here do not negative the existence of the additional facts found in the *Cole Storage Battery case.* It does appear in the present case that petitioner manufactured several types of batteries, any one of which could be used in some automobile. No battery was made to fit any particular automobile unless specially ordered, but the different types have order numbers. (R. 24.)

The burden of establishing the invalidity of the tax was on petitioner. The Court of Claims has not found that the storage batteries were not "for" automobiles, nor does it follow as a matter of law from the facts found that the storage batteries sold were not for automobiles. In this situation we submit the findings do not require a reversal of the decision of the Court of Claims, and that the determination of the Commissioner of Internal Revenue and the judgment of the Court of Claims should be sustained.

In the event that this Court feels the findings now made are not sufficient to sustain the judgment below, we request consideration of the Government's motion to remand the case to the Court of Claims for further findings in view of the meagerness of

the findings, of the peculiar circumstances here existing, and of the fact that the Government does not seek to change the existing findings but merely to add matters upon which the Court of Claims has made no findings. A detailed explanation of the situation and argument in support of the motion is printed with the motion.

No. 275. Vesta Battery Corporation

In this case the findings show the construction of storage batteries and describe their various uses as in the *Universal case*. But here the findings go further than in the *Universal case* and show that the batteries taxed "were of the type especially suitable for use on automobiles as replacements for the batteries forming a part of the original equipment of such cars and were not adapted to any other primary purpose or use." The findings also show that the batteries in question were advertised for automobile uses. (R. 27.) We submit that it follows that the batteries are parts or accessories for automobiles within the meaning of the statute. If an article, which was especially suitable for such use, and was not adapted to any other primary purpose, and was extensively advertised for such use, is not a part for an automobile, it is hard to conceive of any article that could be classed as a part for an automobile until it became actually attached thereto. It is submitted that to deny the tax on such articles would be to render the provisions of the statute futile.

No. 350. Bassick Manufacturing Company

This case involves the gasoline strainers called "gascolators." While the findings show that the articles had uses other than on automobiles, trucks, and motor cycles, they clearly show that the articles were designed for internal-combustion engines. Naturally the principal market therefor would be automobiles, trucks, and motor cycles. The findings show that advertisements after the period of taxation in question specifically advertised these articles for automobile uses. (R. 11.) The advertisements were published about eight months after the date of the taxing period and are competent as showing the intent of the manufacturer and seller with reference to the uses intended.

The findings show that there was a difference in the gascolators sold by petitioner in the size of the "adapter," which is a device to connect the gascolator to the fuel pipe. Their interchangeability on internal-combustion engines depended on the sizes of the fuel pipe and adapter. It does not appear what quantities, if any, were sold with adapters suitable for other uses than on automobile engines.

The findings in this case are meager, and a careful scrutiny of them discloses that the Court of Claims has not stated that the petitioner sold any gascolators for use as parts of automobiles to any persons other than manufacturers or producers of automobiles. A sale to a manufacturer or producer

of an automobile is not taxable under Section 900 (1) or (2), and Subparagraph (3) of this section expressly excepts sales to manufacturers or producers of automobiles. But the fact that the court found for the defendant leads to the conclusion that it intended to state that large numbers of sales were made to persons (other than manufacturers) who might normally be expected to sell gascolators for use on automobiles. Moreover, there is no express finding that such sales were not made.

If this Court should feel that the omission to make findings in regard to this matter is important, we request consideration of our motion to remand the case to the Court of Claims for further findings.

No. 351. F. W. Stewart Manufacturing Corporation

This suit involved taxes on parts for automobile speedometers, and the findings show that they were especially designed, manufactured, and sold for use on or in connection with automobiles and were not adapted for any other purpose or use. This finding, we urge, is conclusive as to the taxability of the articles involved. We submit that these articles are taxable on the principle laid down in *Worth Bros. Co.* v. *Lederer, supra; Forged Steel Wheel Co.* v. *Lewellyn, supra;* under the express provisions of Article 16 of Regulations 47.

No. 352. Gemco Manufacturing Company

This suit involved taxes on bumpers for automobiles, and bars, brackets, and fittings for use as

replacement parts of such bumpers. Here, as in the *Stewart case,* the court found that the articles were especially designed, manufactured, and sold for use on or in connection with automobiles, and are not adapted for any other purpose or use. Again we submit that this finding conclusively shows the correctness of the tax, and that the same principles apply as in No. 351.

CONCLUSION

Each case turns upon its own facts. The Court of Claims has determined the cases upon the facts found to exist in each case, and we contend that there is no finding entitling any of the petitioners to recover, and that the judgments should be affirmed.

Respectfully submitted.

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Special Assistants to the Attorney General.
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Attorney.

JANUARY, 1930.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1122, so far as applicable provides:

> That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> (1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motor cycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;
>
> * * * * *

Section 900 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 291, in all material respects follows Section 900 of the Act of 1918.

The pertinent provisions of Regulations No. 47, promulgated May 1, 1919, are as follows:

ART. 15. *Definition of parts.*—A "part" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, and which is primarily adaptable only for use as a component part of such vehicle. Mere stock or commercial commodities such as bolts, nuts, washers, screws, though used as components for such vehicles, are not "parts" within the meaning of subsection (3) of section 900. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adaptable for use as component parts of such vehicles. Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adaptable for use as such a component part. * * *

ART. 16. *Definition of accessories.*—An "accessory" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be attached to or used in connection with such vehicle to add to its utility, and which is primarily adaptable for use in connection with such vehicle, whether or not essential to its operation. The term "accessories" includes, for example, horns, speedometers, self-starters, spot-lights, shock absorbers, tire pumps, pressure gauges, and hydrometers. * * * If any doubt * * * exists as to the special adaptability of an article the fact of

its sale by the manufacturer to be used with an automobile or to an automobile accessories dealer will determine its taxability. A wrench or other tool of a kind sold in hardware stores for general purposes is not subject to the tax, but a wrench or other tool of special design or construction primarily adapted to be used in connection with automobiles will be subject to the tax. Robes, goggles, and lunch kits are not subject to the tax. * * *

The parts quoted of the above articles were continued without material change in revised editions of Regulations 47, promulgated December 27, 1920, and January 6, 1922.

In Regulations No. 47 (Revised August, 1924), promulgated August 29, 1924, the provisions read as follows:

ART. 16. *Parts or accessories—Definition of parts.*—A "part" for an automobile truck, automobile wagon, or other automobile chassis or body, or motor cycle, is any article designed or manufactured for the special purpose of being used as, or to improve, repair, or replace, a component part of any such vehicle, or article, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, or which is primarily adapted only for use as a component part of such vehicle or article.

Definition of accessories.—An "accessory" for an automobile truck, automobile wagon, or other automobile chassis or body, or motor cycle, is any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily

adapted for use in connection with such vehicle or article whether or not essential to its operation or use. * * *

Articles which have a general commercial use and which are not especially designed or peculiarly adapted for use in connection with automobile truck, automobile wagon, or other automobile chassis or bodies, or motor cycles, are not subject to tax as "parts or accessories." Thus a wrench or other tool of a kind ordinarily sold in hardware stores for general purposes is not subject to tax when sold separately; but if incorporated in an automobile tool kit, designed, intended, advertised, or held out for use on an automobile, as distinguished from garage or shop equipment, is taxable as a part of the assembled kit. A wrench or other tool of special design or construction, primarily adaptable for use in connection with automobiles, and which is intended to be carried in the car, is taxable.

Mere stock or commercial commodities such as bolts, nuts, washers, screws, etc., though used as components for taxable articles, are not "parts" within the meaning of subdivision (3) when sold separately. Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

Component parts of articles taxable under the definition of "parts" are taxable when sold separately if they have reached such a stage of manufacture that they are primarily adapted for use as component parts. * * *

* * * * *

Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motor cycles, primarily adapted for use on or in connection therewith, are taxable when sold by the manufacturer thereof, regardless of the purpose for which used.

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(Insert to be added as Appendix in brief for the United States in Nos. 127, 275, 350, 351, and 352, *Universal Battery Company, Petitioner,* v. *The United States* and other cases consolidated with it for hearing.)

The following are extracts from Regulations 47 promulgated August 29, 1924:

> ART. 15. *Tires, inner tubes, parts, and accessories sold to manufacturers.*—The tax of 2½ per cent applies to *all* tires, inner tubes, parts, or accessories sold separately by the manufacturer thereof, unless the sale is made to a manufacturer who furnishes a certificate in the form provided in this article for the exemption of such sale. The above applies regardless of the fact that tires, inner tubes, parts, or accessories may be sold for use on chassis selling for $1,000 or less or bodies selling for $200 or less.
>
> The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as "tires, inner tubes, parts, or accessories," and shall not be understood to embrace raw materials used in the manufacture of such articles.
>
> Unvulcanized sheet rubber, liquid rubber vulcanizing cement, and friction fabrics are considered raw materials, and are exempt from tax.

Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a "part or accessory."

* * * * *

ART. 16. * * *

* * * * *

Definition of accessories. * * *

As the rate of taxation is the same on both parts and accessories, it is not necessary to differentiate with respect to certain articles that may be classed as either one or the other.

The following may be mentioned as examples of "parts or accessories": Automobile tops, back and side curtains, wheels, engines, springs, axles, axle shafts, radiators, horns, speedometers, self-starters, spot lights, shock absorbers, bumpers, tire pumps, pressure gauges, jacks, etc. When sold separately a side car is taxable as a "part."

Somewhat similar provisions occur in some of the earlier regulations referred to above.

U. S. GOVERNMENT PRINTING OFFICE: 1919

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No. 127

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNIVERSAL BATTERY COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MOTION OF THE UNITED STATES TO REMAND AND BRIEF IN SUPPORT THEREOF

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 127

UNIVERSAL BATTERY COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MOTION OF THE UNITED STATES TO REMAND

Comes now the United States, the respondent herein, by the Solicitor General, and moves the Court to remand the above-entitled cause to the Court of Claims for additional findings of fact, as hereinafter set forth, in the event that this Court is of the opinion that the decision of the Court of Claims should not be affirmed upon the record as presented to this Court.

This case raises the question whether petitioner established in the Court of Claims that electric storage batteries manufactured and sold by it during the period from March, 1919, to September, 1923, on which excise taxes were paid, were not

"parts or accessories for" automobile trucks, automobile wagons, other automobiles, or motor cycles, within the meaning of Section 900 (3) of the Revenue Acts of 1918 and 1921.

The Court of Claims, in its disposition of the case, made certain findings of fact and concluded that the petitioner was liable for the taxes in question and thereupon rendered a judgment dismissing the petition. These findings show that during the period in question petitioner manufactured and sold several types of storage batteries, any one of which could be used in some automobile; that storage batteries, such as were manufactured by petitioner during said period, were used in motor boats, farm tractors, farm lighting plants, airplanes, baggage trucks, door bells, railways switches, wireless and ordinary telegraphs, radios, telephones, electroplaters, and fire alarms, as well as for automobiles; and that petitioner sold its batteries to garage men, accessory dealers, radio dealers, jobbers, and distributors, and had no means of knowing what percentage of its batteries were used for any particular purpose. (R. 23-24.)

The Government contends that the Court of Claims did not find the following relevant and material facts which were shown by the record in that court:

(1) That petitioner designed the batteries with respect to which excise taxes were paid for the special purpose of being used to replace a component part for automobiles;

(2) That petitioner's business policy was to cater to the needs of automobile and motor-truck owners for replacement batteries.

(3) That the term "automobile storage battery" is used in trade parlance.

Wherefore, it is respectfully prayed that, if this Court is of the opinion, because of incomplete findings, that the judgment below should not be affirmed, an order be entered remanding said cause to the Court of Claims for findings upon each the facts hereinbefore set forth and upon such further and additional facts, if any, as this Court may deem necessary.

Respectfully submitted.

CHARLES E. HUGHES, JR.,
Solicitor General.

JANUARY, 1930.

BRIEF ON MOTION TO REMAND

The record below discloses the following:

It was stipulated that the oral testimony taken in the *Cole Storage Battery case* should be considered as a part of the testimony in the instant case, except where it relates particularly to the *Cole case*. (R. 83.) There was uncontradicted testimony that the general construction of the storage battery of the two companies and the manner of manufacturing the batteries by the two companies were the same. (R. 85, 88.) Petitioner was not required to pay taxes on certain batteries designed for radio and certain other specified uses. (R. 87, 91.) Batteries manufactured by petitioner for operating platform trucks and for lighting purposes required a higher capacity than the batteries with reference to which the tax was collected. (R. 93.) Petitioner's business has been to cater to the needs for replacement of batteries on automobiles. (R. 94.) It issued on September 1, 1922, a circular bearing the slogan: "A Battery for Every Make of Car," listing a large number of specified types of batteries as suitable for numerous specified makes of car. This and other circulars specified certain types of batteries as suitable for certain other purposes. (Claimant's Exhibits 1, 2.) The same battery shown in the circular for auto-

mobiles can be used for farm light, radio, truck, tractor, and telephone signal. (R. 95.) The expression "automobile storage battery" is used in trade parlance. (R. 95.)

The testimony in the two cases as to the possible uses to which the batteries taxed might be put and the lack of knowledge of the companies as to the uses for which they actually were put is similar. (cf. R. 86–88 in the *Universal case* with R. 114–115 in the *Cole case*.) In the *Cole case* it appeared that the company sold its batteries to garage men, accessory dealers, radio dealers, jobbers and distributors (R. 115); in the *Universal case* to dealers, distributors, jobbers, some tire shops, automobile accessory shops, farm lighting dealers, and radio dealers (R. 86). In neither case did the petitioner show with even an approximate degree of certainty what percentage of its batteries went to each of these distributing agencies. Practically the only testimony on this point in the *Universal case* appears in the following extract from the testimony of the general manager of the company (R. 88):

> Question. Do you know anything about the percentage of storage batteries used for all the different purposes which you have enumerated, limiting your answer, of course, to the storage batteries manufactured by your company?
>
> Answer. Well, approximately so. We specialize in making replacement batteries and parts.

Question. Just as near as you can, if you have an idea as to the percentage?

Answer. I would say approximately a third of what we might term a starting-lighting battery and sixty-six and two-thirds goes for other work.

Question. Other work—that is, for the other purposes enumerated by you other than for starting and lighting?

Answer. That is right.

It does not appear, however, that this was an estimate of the percentage of those batteries which were taxed.

In the *Cole case* the court made the following finding (R. 20 in the Supreme Court):

> Plaintiff during the period involved in this suit manufactured and sold lighting and starting batteries which were designed for the special purpose of being used to replace a component part for automobiles. The majority of such batteries were of six-volt capacity.

We submit that the same basis exists for this finding in the case at bar as existed in the *Cole case.*

On January 7, 1929, the following motion for new trial in the instant case was filed by petitioner in the court below:

> This case was submitted at the same time as *Cole Storage Battery Company* v. *The United States,* D–784, but is different from that case in that in addition to the major question of whether a storage battery is subject to the excise tax provided by Section 900

(3) of the Revenue Act of 1918 and subsequent years, there is the question of Plaintiff's right to have additional interest upon excessive moneys wrongfully collected by the Collector and subsequently refunded, but without the amount of interest thereon as provided by law and more particularly set forth in Plaintiff's brief now on file herein, to which special reference is now made for the Court's convenience to Rec. pp. 52–59, both inclusive.

It will be observed that this motion for new trial did not question the applicability of the principles decided in the *Cole Storage Battery* case to the pending case. The motion for new trial was overruled March 11, 1929.

On April 30, 1929, the following motion upon behalf of the Government was filed in the court below:

> The United States, defendant herein, by its Assistant Attorney General, respectfully requests the Court for permission to file a motion for amendment of the findings heretofore made by the Court in this case and as grounds for the allowance thereof makes the following showing:
>
> The Court entered judgment for the United States in the pending case December 3, 1928, upon the authority of the Cole Storage Battery Case, 65 C. Cls. 164, but the findings of fact made in the pending case did not cover all of the material facts shown by the record and did not conform to ex-

ceptions filed by defendant to the Commissioner's report which exceptions were similar to exceptions made to like findings made in the Cole Storage Battery Company case and which latter exceptions were sustained by the Court.

The findings made in this case do not conform to the findings made by the Court in the Cole Storage Battery Company case. After judgment was entered herein counsel for the United States conferred with counsel for the plaintiff and counsel for the defendant expressed an intention to file motion for amendment of the findings. Counsel for the plaintiff informed counsel for the Government that it was not his intention to make application for review of the case by the Supreme Court upon the issue as to whether the storage batteries in question were liable to excise taxes but would file a motion for a new trial asking consideration of additional issues raised in the case as to whether additional interest should be allowed to the plaintiff on excise taxes paid by plaintiff and which had subsequently been refunded by the United States. On January 7, 1929, counsel for the plaintiff filed such a motion for new trial which motion for new trial was overruled by the Court March 11, 1929. After March 11, 1929, other counsel was retained by plaintiff and said counsel has informed counsel for the Government that a petition will be filed with the Supreme Court asking that the judgment herein as to all points involved be reviewed by certiorari.

Both the pending case and the *Cole case* were referred to the same Commissioner in the Court of Claims for making findings of fact. The Commissioner made essentially the same findings of fact in each case. The Government filed exceptions to each report on the ground that the findings made were incomplete. In the *Cole case* the Court of Claims sustained the exceptions throughout. In the pending case the Government's exceptions appear to have been overlooked.

The Government's motion to remand for additional findings of fact should be granted unless the decision of the Court of Claims is affirmed upon the existing findings of fact.

Respectfully submitted.

CHARLES E. HUGHES, JR.,
Solicitor General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

RALPH C. WILLIAMSON,
Attorney.

JANUARY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 275

VESTA BATTERY CORPORATION, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

FILED JULY 30, 1929

(34,406)

(34,406)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 275

VESTA BATTERY CORPORATION, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 275

VESTA BATTERY CORPORATION, Petitioner,

vs.

THE UNITED STATES, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The above petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on May 6, 1929.

Question Involved

Were the electric storage batteries manufactured and sold by the petitioner during the period in question "parts or accessories" of automobiles within the meaning of Section 900, subsection (3), of the Revenue Acts of 1918 and 1921, and of the regulations issued by the Commissioner of Internal Revenue pursuant thereto?

[fol. 2] The Court below decided the question adversely to the petitioner, dismissing its petition to recover the amount paid as manufacturers excise taxes on the sale of such batteries.

Statutes Involved

The Revenue Act of 1918 (c. 18, 49 Stat. 1057) and the Revenue Act of 1921 (c. 136, 42 Stat. 227) contain identical provisions with respect to the question involved in this case and are as follows:

"Section 900. On and after February 1, 1919, 1918 Act 'January 1, 1922,' 1921 Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following per cent of the price for which so sold or leased:

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or the sale thereof) three per centum.

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, five per cenum.

"(3) Tires, inner tubes, parts or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), five per centum."

Regulations 47, promulgated by the Commissioner of Internal Revenue, in pursuance of the authority granted by Congress, provided in part as follows:

"Art. 14. * * * Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be [fol. 3] used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a 'part' or 'accessory.'"

* * * * * * *

"Art. 15. * * * any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as component part of such vehicle."

* * * * * * *

"Articles, however, which ordinarily would be classed as commercial commodities, become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles."

"Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as such a component part."

* * * * * * *

"Art. 16 * * * any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation."

* * * * * * *

"Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as 'parts' or 'accessories.'"

[fol. 4]

Statement

The facts in this case are fully set out in the Special Findings of Fact made by the court below (R. 20). In brief they are:

The petitioner is a corporation organized under the laws of the state of Illinois, and is now, and has been since 1919, engaged in the manufacture and sale of electric storage batteries (R. 20). During the period from June 3, 1919 to October 20, 1925, the petitioner paid to the respondent, manufacturers excise taxes, penalties and interest in the sum of $376,324.45, on the sale of its batteries prescribed under Section 900, subdivision (3) of the Revenue Acts of 1918 and 1921 (R. 20-22).

On June 24, 1924, the Commissioner of Internal Revenue denied a refund claim for $304,127.25 of these payments, and on February 27, 1926 the Commissioner denied a second refund claim for $73,266.45 (R. 22-23). The petitioner brought

action in the Court of Claims on June 19, 1926, for the refunds claimed (R. 1). Of the total amount paid no refund claim for $50,648.93 was filed within the time prescribed by law. No claim for this amount nor $700 paid in delinquent penalties was made by the petitioner. This leaves a balance claimed of $324,975.52 (R. 22).

Storage batteries of various types and voltages are manufactured and sold to produce electric current utilized for ignition, lighting, and starting service on automobiles; for ignition service in internal-combustion engines, employed on motor boats and for stationary purposes; for the operation of farm lighting plants; for operating telephone exchanges; for operating signal systems; for radios; and for operating railway switches (R. 23).

A technical description of the composition of the batteries manufactured by the petitioner can be found in the Special Finding of the court below (R. 20-24).

The petitioner sold its batteries to dealers and jobbers who were in the business of conducting garages and service stations. The batteries were of the type especially suitable for use on automobiles as replacements and were not primarily adapted for any other purpose or use. They were [fol. 5] advertised for such use. It was not found that plaintiff's batteries were used on the automotive vehicles designated in the taxing statute nor does it appear that petitioner's batteries were not adaptable for all of the uses enumerated above. Neither was it found that the petitioner's batteries were not used for all of such purposes (R. 23-24).

Reasons for Granting the Writ

1. The question presented in this case is now pending in this court on petition for a writ of certiorari in *The Universal Battery Company vs. United States, No. 127*, October Term, 1929. In order to save the rights of the petitioner in the present case pending the court's action on the petition in the Universal Case it is necessary to file the present petition. The same question being involved in this case as that presented in the Universal case, supra, it necessarily follows that substantially all of the reasons advanced in the Universal petition for its being granted are equally applicable here, and the court's disposition of that petition will

be controlling in this. While the distinguishing facts in the two cases may be sufficient to warrant different decisions on the merits, the cases cannot be distinguished as to the reasons for granting the petitions.

Under the circumstance it does not seem necessary to take the Court's time with another brief supporting the petitions for the writs in these cases, and none will be filed unless such a brief is desired by the Court.

Wherefore it is respectfully submitted that this petition should be granted.

George M. Morris, Counsel for Petitioner, 815 Fifteenth Street, Washington, D. C. Of Counsel: Kir-Miller, Baar & Morris.

[fol. 1] IN THE COURT OF CLAIMS OF THE UNITED STATES OF AMERICA

No. F-196

VESTA BATTERY CORPORATION

vs.

THE UNITED STATES

I. PETITION—Filed June 19, 1926

To the Honorable Judges of the United States Court of Claims:

1. Your petitioner, Vesta Battery Corporation, by Harry C. Kinne, its attorney, respectfully represents that it is a corporation organized and doing business under the laws of the State of Illinois, with principal offices in the City of Chicago, County of Cook, and State of Illinois.

2. Your petitioner further represents that Section 900 of the Revenue Act of 1918 provides as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the fol-
[fol. 2] lowing percentages of the price for which so sold or leased—"

"(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum." (1918 and 1921 Act) "(2) 2½ per centum" (1924 Act).

Your petitioner further represents that Section 1309 of said Revenue Act provides as follows:

"That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act."

3. Your petitioner further represents that the material corresponding provisions of the Revenue Act of 1921 and 1924 and the Regulations of the Commissioner of Internal Revenue are identical, for the purposes of this cause, with the provisions of the Revenue Act of 1918 herein set forth, with the exception of the effective date which in respect to the Act of 1921 is January 1, 1922, and of 1924 is June 2nd, 1924.

[fol. 3] 4. Your petitioner further represents that thereafter the Commissioner of Internal Revenue did promulgate, and the Secretary of the Treasury did approve, the following regulations, the same being what is known as Regulations Number 47, Articles 1, 14, 15, and 16 wherein the effective date of said act is designated and an automobile part or accessory is defined as follows (We have set forth herein only such portions of said regulation as are material to this cause):

"Article 1. Effective date.—The tax is imposed on all articles sold or leased by the manufacturer, producer, or

importer on or after February 25, 1919, even though manufactured, produced, or imported before that date."

"Article 14. Tires, inner tubes, parts, and accessories sold to manufacturers.—The words 'tires, inner tubes, parts, or accessories' shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as 'tires, inner tubes, parts, or accessories,' and shall not be understood to embrace raw materials used in the manufacture of such articles. Unvulcanized sheet rubber, liquid rubber vulcanizing cement, and friction fabrics are considered raw materials and are exempt from tax. Any article which has reached a state of manufacture wherein it is in itself a component part or accessory and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer is subject to tax as a 'part or accessory.' * * *"

[fol. 4] "Article 15. Definition of parts.—A 'part' for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, and which is primarily adapted only for use as a component part of such vehicle. The term includes bodies, wheels, engines, springs, axles, radiators, etc. When sold separately a side car and a so-called trailer or 'semi-trailer' so designed that a portion of the load or the weight thereof is carried or borne by the tractor or 'semi-tractor,' are taxable as 'parts.' Mere stock or commercial commodities such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not 'parts' within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicle. Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as such a component part. * * *"

"Article 16. Definition of accessories.—An 'Accessory' for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use [fol. 5] in connection with such vehicle, whether or not essential to its operation. The term 'accessories' includes for example, automobile tops, back and side curtains, horns, speedometers, self-starters, spot lights, shock absorbers, tire pumps, and pressure gauges. Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motorcycles are not subject to tax as 'parts or accessories.' Thus a wrench or other tool of a kind ordinarily sold in hardware stores for general purposes is not subject to tax when sold separately, but if incorporated in an automobile tool kit, is taxable as part of the complete kit. A wrench or other tool of special design or construction primarily adapted for use in connection with automobiles is taxable. If any doubt exists as to the special adaptability of any article, the fact of its sale by the manufacturer to be used with an automobile, or to an automobile accessories dealer, would determine its taxability. Robes, goggles and lunch kits are not subject to tax. Asbestos brake band linings, generator tubing, and radiator hose are not subject to tax unless sold in prepared sizes, lengths, shapes, or with such fittings as make them adapted for use only on or in connection with automobiles. Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motorcycles primarily adapted for use on or in connection therewith when sold for any other purpose are not taxable provided the purchaser files with his order a statement that such parts or accessories are to be used on or in connection with another article of commerce not [fol. 6] enumerated or included in subdivisions (1), (2) or (3) of Section 900. * * *"

5. Your petitioner further represents that Section 3220 of the United States Revised Statutes as amended by the Revenue Acts of 1918, 1921, 1924 and 1926, provides as follows:

"The Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected; * * *, and shall make report to Congress at the beginning of each regular session of Congress of all transactions under this Section."

6. Your petitioner further represents that it is now, and has been for more than five (5) years last past, engaged in the manufacture and sale of storage batteries and that it has paid, involuntarily, the manufacturer's sales tax on all of the batteries so manufactured and sold by it during the term as stated in the claim for refund hereinafter set forth.

7. Your petitioner further represents that on February 7th, 1924, it filed its claim for refund of said taxes, in the sum of Three Hundred Four Thousand One Hundred Twenty-seven and 25/100 ($304,127.25) Dollars, together with interest, a copy of which claim for refund is hereto attached marked Exhibit "A-1," and made a part hereof; that the said amount of Three Hundred Four Thousand One Hundred Twenty-seven and 25/100 ($304,127.25) Dollars [fol. 7] represents the sale tax erroneously collected by the Commissioner of Internal Revenue of the United States from petitioner on storage batteries manufactured and sold by it during the years 1919 to August 31st, 1923, inclusive.

8. Your petitioner further represents that on November 27, 1925, it filed its claim for refund of said taxes, in the sum of Seventy-three Thousand Two Hundred Sixty-six and 45/100 ($73,266.45) Dollars, together with interest, a copy of which claim for refund is hereto attached, marked Exhibit "B-1," and made a part hereof; that the said amount of Seventy-three Thousand Two Hundred Sixty-six and 45/100 ($73,266.45) Dollars represents the sales tax erroneously collected by the Commissioner of Internal Revenue of the United States from Petitioner on storage batteries manufactured and sold by it during the months from Aug. 31 to September, 1923, inclusive.

9. Your petitioner further represents that the total of the two said claims for refund amounts to the sum of Three Hundred Seventy-seven Thousand Three Hundred Ninety-three and 70/100 ($377,393.70) Dollars, and petitioner now claims interest on the refund of said taxes pursuant to the Revenue Act of 1926, hereinafter set forth, from the dates of such payments to the date of final allowance by this Court.

10. Your petitioner further represents that on June 24, 1924, the said entire claim for refund filed with the Commissioner of Internal Revenue on February 7th, 1924, for [fol. 8] Three Hundred Four Thousand One Hundred Twenty-seven and 25/100 ($304,127.25) Dollars was rejected by said Commissioner of Internal Revenue.

11. Your petitioner further represents that on February 27, 1926, the said entire claim for refund filed with the Commissioner of Internal Revenue on November 27, 1925, for Seventy-three Thousand Two Hundred Sixty-six and 45/100 ($73,266.45) Dollars was rejected by said Commissioner of Internal Revenue.

12. Your petitioner further represents that it is now the sole owner of said claims for refund in the total sum of Three Hundred Seventy-seven Thousand and Three Hundred Ninety-three and 70/100 ($377,393.70) Dollars, and that said claims have never been assigned to any other persons whomsoever.

13. Your petitioner further represents that said batteries so manufactured and sold by it are not now, and never were "primarily adapted" for use only in automobiles as provided in Section 900, (1), (2) or (3) of said Revenue Act of 1918 and 1921; and Section 600 of the Revenue Act of 1924; that on the contrary said storage batteries are now, and were always used for the following, as well as many other purposes:

For radio, for farm or cottage lighting plants, for propelling railway, mail and baggage trucks, for propelling motor boats, in connection with stationary engines, tractor engines, marine engines, for lighting railway coaches, for lighting and starting gasoline railway coaches, in connection with door bells, telephones and telegraphs.

[fol. 9] 14. Your petitioner further represents that by reason of the facts herein set forth the storage batteries, so manufactured by it, were and are, commercial commodities and were not, and are not now "primarily adapted only" for use in automobiles; that they have not reached, and none of them ever did reach, such a stage of manufacture that they are, or were, in themselves component parts of automobiles as provided in said Revenue Act and Regulations.

15. Your petitioner, therefore, states that it is justly entitled to the amount herein claimed from the United States after allowing all just credits and set-offs.

16. Your petitioner further represents that it has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government and that it believes the facts as herein set forth to be true.

17. Section 1117 of the Revenue Act of 1926 provides as follows:

"(b) In any judgment of any court rendered after the enactment of the Revenue Act of 1926 (whether against the United States, a collector or deputy collector of Internal Revenue, a former collector or deputy collector, or the personal representative in case of death) for any internal-revenue tax erroneously or illegally collected or assessed, or for any penalty collected without authority or for any sum which was excessive or in any manner wrongfully collected under the internal-revenue laws, interest shall be allowed at the rate of 6 per centum per an-
[fol. 10] num upon the amount of such tax, penalty, or sum, from the date of the payment or collection thereof to the date of entry of such judgment, or, if such judgment is reviewed by an appellate court, to the date of entry of final judgment."

18. Your petitioner, therefore, prays that its claims for taxes paid by it on storage batteries, in the sum of Three Hundred Seventy-seven Thousand Three Hundred and Ninety-three and 70/100 ($377,393.70) Dollars, with interest

thereon, pursuant to Section 1117 of the 1926 Revenue Act may be allowed against the United States by this Honorable Court, and that such other orders may be entered herein as may be just and equitable.

Vesta Battery Corporation, by Ward S. Perry, Pres.
(Corporate Seal.)

Duly sworn to by Ward S. Perry. Jurat omitted in printing.

[fol. 11] PLAINTIFF'S EXHIBIT "A-1" TO PETITION

(On Federal Excise Tax Refund Form)

Claim for Excise Taxes

(X) Refund of Taxes Illegally Collected

STATE OF ILLINOIS,
County of Cook, ss:

Vesta Battery Corporation (Name of taxpayer or purchaser of stamps).

2100 Indiana Avenue (Residence—give street and number as well as city or town and State).

Chicago, Illinois (Business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete.

1. Business in which engaged: Batteries and Accessories. Period from Feb. 26, 1919, to Aug. 31, 1923.

2. Character of assessment or tax: Excise Tax paid on Batteries. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased per schedule attached: $304,127.25.

4. Reduction of Tax Liability requested (Income and Profits Tax): ——.

[fol. 12] 5. Amount to be abated: ——.

6. Amount to be refunded (or such greater amount as is legally refundable): $304,127.25.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): ——. (If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: ——.

9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: ——.

11. Unpaid assessment against which credit is asked, period from —— —, ——, to —— —, ——: ——.

Deponent verily believes that this application should be allowed for the following reasons:

The amount of this claim represents Excise Tax paid under Section 900 Title IX of the Revenue Acts of 1918 and 1921, upon the sale of electric storage batteries to persons other than Manufacturers of Automobiles. Brief in support of this Claim was filed with the Commissioner of Internal Revenue under date of December 31, 1923.

[fol. 13] Vesta Battery Corporation, Chicago, Illinois

Total Excise Tax Paid on Batteries Sold from February 26, 1919, to August 31, 1923

Month	Year 1919	1920	1921	1922	1923
January	.....	5,070.09	3,362.62	3,592.11	4,043.59
February	547.73	4,696.26	4,730.94	5,766.18	3,803.95
March	5,319.89	8,026.98	7,796.06	6,292.50	7,177.27
April	7,286.16	7,657.70	8,751.45	6,214.63	5,497.09
May	5,200.26	11,994.20	4,317.68	5,485.95	3,233.34
June	4,314.77	6,904.02	4,016.34	4,114.91	2,760.68
July	3,689.60	5,219.11	4,341.42	3,887.60	2,958.08
August	5,322.49	5,521.60	7,708.05	5,377.61	4,352.14
September	6,800.36	5,905.35	8,347.68	6,021.97	.....
October	7,472.07	6,013.84	7,615.00	5,988.64	.....
November	6,464.95	4,323.53	4,172.86	6,663.47	.....
December	7,599.89	4,191.90	3,871.61	5,580.43	.....
Totals	$60,018.07	$76,254.58	$69,031.71	$64,986.00	$33,836.89

Year	Amount
1919	$60,018.07
1920	76,254.58
1921	69,031.71
1922	64,986.00
1923	33,836.89
Total	$304,127.25

(Signed) Vesta Battery Corporation, by —— ——.

[fol. 14] PLAINTIFF'S EXHIBIT "B-1" TO PETITION

(On Federal Excise Tax Refund Form)

Claim for Excise Taxes

(X) Refund of Taxes Illegally Collected

STATE OF ILLINOIS,
County of Cook, ss:

Vesta Battery Corporation (Name of taxpayer or purchaser of stamps).

2100 Indiana Avenue (Residence—give street and number as well as city or town and State).

Harry C. Kinne, Attorney-at-law, 160 N. LaSalle St., Chicago, Illinois (Business address).

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Manufacture of batteries and parts. Period from Aug. 30, 1923, to Sep. 30, 1925.

2. Character of assessment or tax: (Manufacturer's Excise Tax. (State for or upon what the tax was assessed or the stamps affixed.)

3. Amount of assessment or stamps purchased: ——.

4. Reduction of Tax Liability requested: (Income and Profits Tax.)

5. Amount to be abated: ——.

[fol. 15] 6. Amount to be refunded (or such greater amount as is legally refundable): $73,266.45.

7. Dates of payment (see Collector's receipts or indorsements of canceled checks): ——. (If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: ——.

9. District in which unpaid assessment appears: ——.

10. Amount of overpayment claimed as credit: ——

11. Unpaid assessment against which credit is asked, period from ——— —, ———, to ——— —, ———: ———.

Deponent verily believes that this application should be allowed for the following reasons:

That said amount, $73,266.45, above indicated, was paid on sales of storage batteries on August 30th, 1923, and on or about the last day of each and every succeeding month thereafter, to and including September 30, 1925, for the period indicated in the above places provided for that purpose; that the said batteries are commercial commodities and are not in themselves component parts or accessories of automobiles within the meaning of Section 900 of the Revenue Acts of 1918 and 1921 or Section 600 of the Revenue Act of 1924; that said Sections of said Revenue Acts did not levy a tax on the manufacture of storage batteries, and that said storage batteries are not subject to tax under said Sections of said Revenue Acts. There are attached hereto the following papers: (1) Brief in support of claim (2) Statement of tax paid (3) Power of Attorney (4) Two affidavits and letter.

[fol. 16]

Excise Tax Paid

Sales period	Date paid	On batteries	On lamps & generators	Total
Sept. 1923	May 23, 1924	4,948.57	.....	4,948.57
	Oct. 20, 1923	.....	90.43	90.43
Oct. "	May 23, 1924	6,182.36	.....	6,182.36
	Nov. 27, 1923	.....	189.80	189.80
Nov. "	May 23, 1924	8,634.50	.....	8,634.50
	Dec. 27, 1923	.....	162.56	162.56
Dec. "	Feb. 2, 1924	4,312.61	.....	4,312.61
	Jan. 29, "	.....	89.40	89.40
Jan. 1924	Feb. 27, "	5,652.61	55.52	5,708.13
Feb. "	Mar. 25, "	5,877.37	44.20	5,921.57
Mar. "	Apr. 28, "	4,539.27	84.43	4,623.70
Apr. "	May 26, "	2,627.80	171.14	2,798.94
May "	June 28, "	2,044.20	106.38	2,150.58
June "	July 29, "	1,699.66	55.73	1,755.39
July "	Aug. 27, "	1,356.57	34.24	1,390.81
Aug. "	Sep. 24. "	1,733.04	34.44	1,767.48
Sep. "	Oct. 29, "	2,310.21	33.75	2,343.96
Oct. "	Nov. 25, "	2,315.10	52.43	2,367.53
Nov. "	Dec. 26, "	2,181.53	31.35	2,212.88
[fol. 17]				
Dec. "	Jan. 29, 1925	2,966.54	25.97	2,992.51
Jan. 1925	Feb. 28. "	2,432.96	24.94	2,457.90
Feb. "	Mar. 28, "	1,088.72	22.37	1,111.09

Mar.	"				
Apr.	"	Apr. 27, "	1,621.85	26.68	1,648.53
May	"	May 25, "	1,546.63	45.65	1,592.28
June	"	June 26, "	1,083.93	60.18	1,144.11
July	"	July 29, "	1,244.96	37.25	1,282.21
Aug.	"	Aug. 25, "	1,341.07	42.31	1,388.38
Sep.	"	Sep. 29, "	1,725.28	50.25	1,775.53
		Oct. 30, "	1,799.11	50.01	1,849.12
Total			73,266.45	1,621.41	74,887.86

(Signed) Vesta Battery Corporation. (Signed) F. J. Freitag, Treas.

Sworn to and subscribed before me this 27th day of November, 1925. (Signed) J. D. Millar, Notary Public.

[fol. 18] II. General Traverse—Filed August 18, 1926

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

R. C. W.

III. History of Proceedings

On December 3, 1928, the court issued a rule to show cause, returnable January 7, 1929, why the the case should not be dismissed.

On January 7, 1929, the plaintiff was ordered to file answer to rule to show cause.

On January 15, 1929, the plaintiff was allowed to file an additional brief.

On February 4, 1929, on motion made therefor, the plaintiff was allowed to argue the rule to show cause.

On March 19, 1929, the rule to show cause was argued and submitted by Mr. George M. Morris, for the plaintiff, and by Mr. Ralph C. Williamson, for the defendant.

On April 1, 1929, the court entered the following order on the rule to show cause:

Order

This case came on to be heard on a Rule to Show Cause why the petition herein should not be dismissed; on the plaintiff's answer thereto, and the defendant's reply to the plaintiff's answer; and it appearing

That on the call of the General Docket December 3, 1928, the Rule in this case was issued on motion of the defendant's attorney upon the ground that this case was controlled by the decision in the case of the Cole Storage Battery Com-

[fol. 19] pany, No. D-784, and that its hearing had been deferred with the consent of the court and the parties to await the decision in said Cole Storage Battery Company case; and

That after due notice the plaintiff appeared and filed its written answer to the said Rule, to which answer the defendant filed its written reply; and

That after the plaintiff filed its answer to said Rule the case was placed on the Calendar of the court and in due course came on for hearing and was submitted after argument.

Now, therefore, upon due consideration the court, being of the opinion that this case is controlled by the said Cole Storage Battery Company case, Orders this 1st day of April, 1929, that the said Rule be and it is made absolute, and the plaintiff's petition is dismissed.

On April 20, 1929, the plaintiff filed a motion for special findings of fact.

Said motion was allowed, and the court, on May 6, 1929, filed the following special findings of fact and conclusion of law:

[fol. 20] IV. **Special Findings of Fact and Conclusion of Law**—Filed May 6, 1929

This case having been heard by the Court of Claims, the Court, upon the report of a Commissioner and the evidence, makes the following

SPECIAL FINDINGS OF FACT

I

The plaintiff is a corporation duly incorporated under the laws of the State of Illinois, with its principal place of business in Chicago, in the State of Illinois, and is now, and has been since 1919, engaged in the manufacture of storage batteries.

II

The plaintiff, under the provisions of section 900, subdivision 3, of the revenue acts of 1918 and 1921, paid the United States manufacturer's excise taxes, penalties, and interest on storage batteries, storage battery parts, lamps, and generators in the amounts and on the dates as follows:

Part A

Period for which paid	Date of receipt	Amount of receipt	Amount paid on storage batteries	Amount paid on lamps and generators	Amount paid on battery parts
January, 1919					
February, 1919					
March, 1919	June 3, 1919	$5,472.77	$5,472.77		
Do	Jan. 9, 1920	979.24			$979.24
Do	Sept. 8, 1920	111.14			111.14
April, 1919	June 3, 1919	6,810.84	6,810.84		
Do	Jan. 9, 1920	1,783.26			1,783.26
Do	Sept. 8, 1920	202.40			202.40
May, 1919	July 10, 1919	5,117.12	5,056.20		60.92
Do	Jan. 9, 1920	1,422.34			1,422.34
Do	Sept. 8, 1920	146.50			146.50
June, 1919	Aug. 5, 1919	4,026.72	4,026.72		
Do	Jan. 9, 1920	1,098.55			1,098.55
Do	Sept. 8, 1920	113.15			113.15
July, 1919	Sept. 5, 1919	3,574.10	3,574.10		
Do	Jan. 9, 1920	984.10			984.10
Do	Sept. 8, 1920	91.03			91.03
[fol. 21] August, 1919	Oct. 8, 1919	5,165.24	5,165.24		
Do	Jan. 9, 1920	1,489.96			1,489.96
Do	Sept. 8, 1920	122.18			122.18

September, 1919	Nov.	4, 1919	6,606.04	6,606.04	.....	.....
Do	Jan.	9, 1920	1,115.98	.....	.....	1,115.98
Do	Sept.	8, 1920	79.80	.....	.....	79.80
October, 1919	Dec.	4, 1919	7,675.89	7,472.07	203.82	.....
Do	Jan.	9, 1920	1,490.26	.....	.....	1,490.26
Do	Sept.	8, 1920	90.91	.....	.....	90.91
November, 1919	Jan.	8, 1920	7,538.83	6,464.95	365.32	708.56
Total	.....	.....	63,308.35	50,648.93	569.14	12,090.28
December, 1920	Feb.	9, 1920	9,073.75	7,599.89	819.55	654.31
January, 1920	Mar.	13, 1920	7,456.41	6,070.09	471.86	914.46
February, 1920	Apr.	7, 1920	6,300.30	4,696.26	785.20	818.84
March, 1920	May	18, 1920	9,857.71	8,026.98	717.31	1,113.42
April, 1920	June	17, 1920	9,200.54	7,657.70	203.05	1,339.79
May, 1920	July	10, 1920	13,857.96	11,994.20	434.47	1,429.29
June, 1920	Aug.	13, 1920	8,593.34	6,904.02	580.46	1,108.86
July, 1920	Sept.	14, 1920	6,794.02	5,219.11	684.85	890.06
August, 1920	Oct.	16, 1920	6,578.69	5,251.60	611.85	715.24
September, 1920	Nov.	9, 1920	7,100.69	5,905.35	512.62	682.72
Octobe-, 1920	Dec.	7, 1920	7,227.17	6,013.84	288.31	925.02
Nover..ber, 1920	Jan.	12, 1921	5,905.23	4,323.53	618.18	963.52
December, 1920	Feb.	9, 1921	5,270.5o	4,191.90	340.15	738.33
January, 1921	Mar.	14, 1921	4,023.32	3,362.62	229.37	431.33

Part A—Continued

Period for which paid	Date of receipt	Amount of receipt	Amount paid on storage batteries	Amount paid on lamps and generators	Amount paid on battery parts
February, 1921	Apr. 15, 1921	5,680.52	4,730.94	285.99	663.59
March, 1921	May 4, 1921	9,107.19	7,796.06	672.51	638.62
April, 1921	June 15, 1921	10,008.56	8,751.45	548.76	708.35
May, 1921	July 13, 1921	5,011.53	4,317.68	369.95	223.90
June, 1921	Aug. 11, 1921	4,889.09	4,016.34	398.72	474.03
July, 1921	Sept. 7, 1921	5,096.97	4,341.42	433.38	322.17
August, 1921	Oct. 5, 1921	8,561.77	7,708.05	372.56	481.16
September, 1921	Nov. 9, 1921	9,396.69	8,347.68	501.35	547.66
October, 1921	Dec. 7, 1921	8,771.39	7,615.00	273.73	882.66
November, 1921	Jan. 6, 1922	4,995.57	4,172.86	319.16	503.55
December, 1921	Feb. 2, 1922	4,507.48	3,871.61	305.31	330.56
January, 1922	Mar. 3, 1922	3,969.88	3,592.11	89.55	288.22
February, 1922	Apr. 18, 1922	6,302.05	5,766.18	234.59	301.28
March, 1922	Apr. 30, 1922	6,427.59	6,292.50	135.09	.....
April, 1922	May 21, 1922	6,489.30	6,214.63	274.67	.....
May, 1922	June 30, 1922	5,636.74	5,485.95	150.79	.....
June, 1922	July 31, 1922	4,302.64	4,114.91	187.73	.....
July, 1922	Aug. 31, 1922	4,578.99	3,887.60	691.39	.....
August, 1922	Sept. 30, 1922	5,711.57	5,377.61	333.96	.....
September, 1922	Oct. 31, 1922	6,223.77	6,021.97	201.80	.....
October, 1922	Nov. 29, 1922	6,222.30	5,988.64	233.66	.....

November, 1922	Dec. 29, 1922	5,568.98	5,379.59	189.39	
Do	do	1,283.88	1,283.88		
December, 1922	Jan. 20, 1923	5,772.17	5,580.43	191.74	
January, 1923	Feb. 28, 1923	4,132.80	4,043.59	89.21	
February, 1923	Mar. 30, 1923	3,879.91	3,803.95	75.96	
March, 1923	Apr. 28, 1923	7,407.50	7,177.27	230.23	
April, 1923	May 31, 1923	5,801.46	5,497.09	304.37	
May, 1923	June 30, 1923	3,620.97	3,233.34	387.63	
June, 1923	July 27, 1923	3,152.39	2,760.68	391.71	
July, 1923	Aug. 29, 1923	3,208.28	2,968.83	239.45	
August, 1923	Sept. 28, 1923	4,575.32	4,352.14	223.18	
Total of Claim Feb. 7, 1924		350,843.11	302,358.00	17,203.89	31,281.22

Part B

September, 1923	May 23, 1924	$4,948.57	$4,948.57		
Do	Oct. 20, 1923	90.43		$90.43	
October, 1923	May 23, 1924	6,182.36	6,182.36		
Do	Nov. 27, 1923	189.80		189.80	
November, 1923	May 23, 1924	8,634.50	8,634.50		
Do	Dec. 27, 1923	162.56		162.56	
December, 1923	Feb. 2, 1924	4,312.61	4,312.61		
Do	Jan. 29, 1924	89.40		89.40	

Part B—Continued

Period for which paid	Date of receipt	Amount of receipt	Amount paid on storage batteries	Amount paid on lamps and generators	Amount paid on battery parts
January, 1924	Feb. 27, 1924	5,708.13	5,652.61	55.52	.....
February, 1924	Mar. 25, 1924	5,921.57	5,877.37	44.20	.....
March, 1924	Apr. 28, 1924	4,623.70	4,539.27	84.43	.....
April, 1924	May 26, 1924	2,798.94	2,627.80	171.14	.....
	May 28, 1924	700.00	700.00	.....	.....
[fol. 22] May, 1924	June 28, 1924	2,150.58	2,044.20	106.38	.....
June, 1924	July 29, 1924	1,755.39	1,699.66	55.73	.....
July, 1924	Aug. 27, 1924	1,390.81	1,356.57	34.24	.....
August, 1924	Sept. 24, 1924	1,767.48	1,733.04	34.44	.....
September, 1924	Oct. 29, 1924	2,343.96	2,310.21	33.75	.....
October, 1924	Nov. 25, 1924	2,367.53	2,315.10	52.43	.....
November, 1924	Dec. 26, 1924	2,212.88	2,181.53	31.35	.....
December, 1924	Jan. 29, 1925	2,992.51	2,966.54	25.97	.....
January, 1925	Feb. 28, 1925	2,457.90	2,432.96	24.94	.....
February, 1925	Mar. 28, 1925	1,111.09	1,088.72	22.37	.....
March, 1925	Apr. 27, 1925	1,648.53	1,621.85	26.68	.....
April, 1925	May 25, 1925	1,592.28	1,546.63	45.65	.....
May, 1925	June 26, 1925	1,144.11	1,083.93	60.18	.....
June, 1925	July 29, 1925	1,282.21	1,244.96	37.25	.....
July, 1925	Aug. 25, 1925	1,383.38	1,341.07	42.31	.....

August, 1925	Sept. 29, 1925	1,775.53	1,725.28	50.25	.....
September, 1925	Oct. 20, 1925	1,849.12	1,799.11	50.01	.....
Total of claim filed Nov. 18, 1925	.....	75,587.86	73,966.45	1,621.41	.....

Summary of Parts A and B

Part A	$350,843.11	$302,358.00	$17,203.89	$31,281.22
Part B	75,587.86	73,966.45	1,621.41	.....
Total	426,430.97	376,324.45	18,825.30	31,281.22
Amount paid previous to January, 1920	.....	50,648.93	.....	.....
		325,675.52		
Amount paid on May 28, 1924, for penalties and interest (no claim made for recovery)	.....	700.00		
		324,975.52		

III

Of the total amount of $376,324.45, taxes paid on storage batteries, $50,648.93 was paid between June 3, 1919, and January 8, 1920, for which no claim of refund was filed within four years, and the plaintiff waives all claim thereto, which leaves a balance of $325,675.52. Of this amount, the sum of $700.00 was paid on May 28, 1924, for penalties and interest which were imposed for delay in payment of taxes on battery parts and no claim is made for the recovery of this amount. The balance, $324,975.52, represents the amount paid as taxes on storage batteries for which claims of refund were made.

IV

The plaintiff filed a claim for refund on May 19, 1922, of taxes paid for battery parts sold separately, and the sum of $31,281.22 was repaid to plaintiff with interest on December 26, 1922, and January 2, 1923. This refund related to taxes paid prior to May 19, 1922. The plaintiff waived claim for refund of $653.51 paid on battery parts.

V

On February 7, 1924, plaintiff filed with the Commissioner of Internal Revenue claim for refund in the sum of $304,127.25, which claim was rejected by the Commissioner on June 24, 1924.

[fol. 23] On November 27, 1925, plaintiff filed with the Commissioner of Internal Revenue claim for refund in the sum of $73,266.45 and said claim for refund was rejected by the Commissioner on February 27, 1926.

No claim is made herein for a refund of taxes paid on lamps and generators.

VI

A storage battery is composed of a container (a glass or rubber jar, a positive and negative group of plates immersed in an electrolyte solution (which may be acid or alkaline, depending on the metals used), usually dilute acid, a group of which plates is usually made of oxide or dioxide of lead and the other group of gray oxide of lead. The oxides usually are spread over a lead frame or grid to

form a plate. The dioxide and acid are decomposed and form a new sulphate with the other plate. Small wooden partitions or squares, called separators, are inserted between the plates to keep them from touching, buckling together, or shortening. The negative plates are connected together, as are also the positive plates. A top is put on the jar and sealed over with sealing wax, leaving a terminal post exposed. A cell is composed of a certain number of positive and negative plates. A battery may consist of one or more cells, usually of three to six cells. One cell will produce an electric current of two volts. There is no particular shape for a storage battery. Sometimes storage batteries are oblong, sometimes square, depending on whether the cells are put in end to end or with flat sides together. A storage battery may consist of any number of cells, depending upon the voltage desired.

VII

Storage batteries of various types and voltages are manufactured and sold to produce electric current utilized for ignition, lighting, and starting service on automobiles; for ignition service in internal-combustion engines, employed on motor boats and for stationary purposes; for the operation of farm lighting plants; for operating telephone exchanges; for operating signal systems; for radios; and for operating railway switches.

VIII

The plaintiff sold its batteries principally to dealers and jobbers, who were in the business of conducting garages and service stations. The batteries manufactured and sold by plaintiff, which were the subject matter of the taxes in question in this case, were of the type especially suitable for use on automobiles as replacements for the batteries forming a part of the original equipment of such cars and were not adapted to any other primary purpose or use. Plaintiff issued a catalogue in which these batteries were advertised for use in automobiles. The catalogue stated, "A Vesta Battery for every car," and prospective purchasers were requested in ordering batteries to specify the kind of automobile for which the battery was required. Fifteen types of battery were manufactured and sold by

the plaintiff, and any one of them could be used in some automobile.

[fol. 24] CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff for the cost of printing the record in this cause, the amount thereof to be ascertained by the clerk and collected by him.

See case of Cole Storage Battery Co. v. United States, 65 C. Cls. 164.

[fol. 25] V. Judgment

At a Court of Claims held in the City of Washington on the 6th day of of May, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause the amount thereof to be ascertained by the clerk and collected by him according to law, which amount is found to be $119.54.

See case of Cole Storage Battery Co. v. United States, 65 C. Cls., 164.

[fol. 26] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,406. Court of Claims Term No. 275. Vesta Battery Corporation, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed July 30, 1929. File No. 34,406.

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 275

VESTA BATTERY CORPORATION,

PETITIONER,

v.

THE UNITED STATES,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF ON BEHALF OF PETITIONER

THE ACTION OF THE COURT BELOW

The Court below rendered no opinion. The Special Finding of Facts and Judgment of the Court below (R. 19-28) are not yet recorded.

JURISDICTION OF THIS COURT

The Judgment of the Court below was rendered on May 6, 1929 (R-19). Petition for Certiorari was filed

in this Court on July 30, 1929, and granted October 21, 1929. By the same order the case was advanced and assigned for argument with No. 127, Universal Battery company vs. United States. Jurisdiction of this Court is by virtue of Section 240 of the Judicial Code as amended by Section 3 (b) of the Act of February 13, 1925.

THE QUESTION PRESENTED

The sole question in this case is whether the electric storage batteries manufactured and sold by this petitioner to any person other than an automobile manufacturer or producer, are "parts or accessories" for automobile trucks, automobile wagons, other automobiles and motor cycles, within the meaning of the statutes taxing the sale of such parts or accessories.

STATUTES AND REGULATIONS INVOLVED

Statutes.

The Revenue Act of 1918 (c. 18, 40 Stat. 1057) and the Revenue Act of 1921 (c. 136, 42 Stat. 227) contain materially identical provisions with respect to the question involved in this case and are as follows:

> "Section 900. On and after February 1, 1919, [1918 Act; 'January 1, 1922,' 1921 Act] there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following per cent of the price for which so sold or leased:
>
> "(1) Automobile trucks and automobile wag-

ons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or the sale thereof) 3 per centum.

"(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.

"(3) Tires, inner tubes, parts or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

Section 600 of the Revenue Act of 1924, (c. 234, 43 Stat. 253, 322) provides:

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

"(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. A sale or lease of an automobile truck or of an automobile wagon shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body;

"(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body;

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. This subdivision shall not apply to chassis or bodies for automobile trucks, automobile wagons, or other automobiles."

Regulations of Treasury Department.

Regulations 47 promulgated by the Commissioner of Internal Revenue, in pursuance of the authority granted by Congress, provided in part as follows with respect to what constitutes a "part for an automobile truck, automobile wagon, other automobile, or motor cycle," i. e.

"Art. 14. * * * Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a 'part' or 'accessory.'"

* * * * *

"Art. 15. * * * any article designed or manu-

factured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle."

* * * * *

"Articles, however, which ordinarily would be classed as commercial commodities, become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles."

"Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as such a component part."

Art. 16. provides: "An accessory for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation."

* * * * *

"Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as 'parts' or 'accessories.'"

STATEMENT OF THE CASE

The facts in this case are, briefly stated, as follows:

We believe it to be judicial knowledge that the storage battery was a commercial commodity long prior to the advent of the automobile and was commonly and generally used for a variety of practical purposes. Paragraph VI of the Special Finding of Fact below (R. 26-27) describes, in detail, the universal structure of the storage battery. There is no particular shape for a storage battery. Sometimes storage batteries are oblong sometimes square (R. 27, Par. VI).

The petitioner has been since 1919, manufacturing and selling storage batteries. During the period from February, 1919, to September, 1925, the petitioner paid to the respondent manufacturers' excise taxes, penalties and interest in the sum of $376,324.45, upon the sale of storage batteries under Subdivision (3) of Section 900 of the Revenue Acts of 1918 and 1921, and Section 600 of the Revenue Act of 1924. (R. 19-25.) The Commissioner of Internal Revenue denied refund claims and the petitioner brought action in due season for $324,975.52 in the Court of Claims (R. 19-26, Par. I-V).

The batteries were used to furnish electric current for numerous and various devices such as for ignition on internal combustion engines; for operation of farm lighting plants; telephone exchanges; on motor boats; signal systems; radios; ignition, lighting and starting service on automobiles; for operating railway switches, etc. (R. 27, Par. VII).

The batteries were sold principally to dealers and job-

bers, who were in the business of conducting garages and service stations. The batteries were especially suitable for use on automobiles and were not adapted to any other primary purpose. They were advertised for use on automobiles. Any of the batteries could be used on some automobile (R. 27-28, Par. VIII). It does not appear that there were any peculiar characteristics in these batteries which limited them to use in automobiles and the vehicles designated in the statute, or barred these batteries from their common use for the other purposes described.

On these facts the Court of Claims, in its Conclusion of Law, without discussion, rendered judgment against the petitioner, citing *Cole Storage Battery Co. vs. United States*, 65 *Ct. Cls.* 164, as its single authority.

SPECIFICATION OF ERRORS TO BE URGED

I. The Court of Claims erred in finding that the electric storage batteries manufactured and sold by the petitioner were parts or accessories for automobile trucks, automobile wagons, other automobiles and motor cycles and subject to the excise tax on the sale of such parts or accessories.

(a) The Court of Claims erred in its implied finding that the rule announced in *Cole Storage Battery Company vs. U. S.*, 65 *Ct. Cls.* 164, is a correct statement of the intent of the statute involved in this case and in rendering judgment against the petitioner upon such grounds.

(b) The Court of Claims erred in failing to decide that the petitioner is entitled under the law to judgment.

SUMMARY OF ARGUMENT

It is the petitioner's contention:

(A) That the rule of law announced by the Court below is not a proper statement of the law applicable to this case for the reason that:

(1) The absence from Section 900, Subsections (1), (2) and (3), of the extensive language used elsewhere in Sections 900, 907, of the Revenue Act of 1918, negatives any intent to tax as parts or accessories for automobiles, etc., any articles other than those which are strictly parts of the vehicles taxed.

(2) The rule of law evolved below is in direct conflict with the principle that the accepted use of the nomenclature involved shall be employed to determine the limits of the taxing clause.

(3) The rule of law evolved below is in material conflict with the "usage" doctrine developed by this Court to determine taxable classifications.

(B) The proper rules of interpretation demonstrate that the electric storage batteries sold by this petitioner are not parts or accessories for automobiles, etc., and are not taxable as such.

ARGUMENT

The argument outlined in the above summary in support of the Specification of Errors to be Urged is the same as that appearing on pages 12 to 42 of the brief

filed in the case No. 127, Universal Battery Co. vs. United States, the companion case with that at bar and the case with which the present petition has been assigned for argument. The brief in that case is now in the hands of the Court and it seems an unnecessary imposition upon the time and energy of the Court to file another brief, practically all of which would be a repetition of the arguments developed in detail in case No. 127. Therefore, unless the Court indicates its desire for a more lengthy brief in the present case, none will be filed.

CONCLUSION

Wherefore, it is respectfully requested that the judgment of the Court of Claims should be reversed and the cause remanded with direction to enter judgment for your petitioner.

GEORGE M. MORRIS,
Attorney for the Petitioner.

Of Counsel,
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No. 275

In the Supreme Court of the United States

OCTOBER TERM, 1929

VESTA BATTERY CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 275

VESTA BATTERY CORPORATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 19–28) is not yet officially reported.

JURISDICTION

The judgment sought to be reviewed was entered May 6, 1929. (R. 28.) Petition for writ of certiorari was filed July 30, 1929. (R. 28.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

THE QUESTION PRESENTED

Whether petitioner established in the court below that the electric storage batteries manufactured and sold by petitioner were not "parts or accessories for" automobile trucks, automobile wagons, other automobiles or motor cycles within the meaning of Section 900 (3) of the Revenue Acts of 1918 and 1921, and of the Regulations of the Commissioner of Internal Revenue made by authority of said Acts.

THE STATUTES

Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1122, as far as applicable, provides:

> SEC. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> (1) Automobile trucks and automobile wagons (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum.
>
> (2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.
>
> (3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in

subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum.

Section 900 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 291, and Section 600 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 322, are, so far as pertinent to the issues herein, substantially the same as in the earlier Act.

REGULATIONS OF THE COMMISSIONER OF INTERNAL REVENUE

Article 14 of Regulations 47 (December, 1920, edition), adopted by the Commissioner is, in part, as follows:

> Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a "part or accessory."

Article 15 of the same regulation is, in part, as follows:

> A "part" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be

sold for general use and which is primarily adapted only for use as a component part of such vehicle.

* * * * *

* * * Articles, however, which ordinarily would be classed as commercial commodities become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicles.

Component parts of articles taxable under this definition are taxable when sold separately, if they have reached such stage of manufacture that they are primarily adapted for use as a component part. * * *

Article 16 contains the following provisions:

An "accessory" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

* * * * *

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as "parts" or "accessories."

* * *

* * * * *

Parts or accessories for automobile trucks, automobile wagons, other automobiles, or

motor cycles primarily adapted for use on or in connection therewith when sold for any other purpose are not taxable provided the purchaser files with his order a statement that such parts or accessories are to be used on or in connection with another article of commerce not enumerated or included in subdivisions (1), (2), or (3) of section 900. For example, a self-starter primarily adapted for use on an automobile if sold to a manufacturer of motor boats, such manufacturer stating in his order that it is to be used in the manufacture of a motor boat and not upon an automobile, is not taxable.

STATEMENT

In its suit in the court below petitioner asked judgment for $377,393.70, with interest, assessed against it and paid as excise taxes with respect to storage batteries manufactured and sold by it for the period February, 1919, to September, 1925. The Court of Claims on May 6, 1929, entered judgment for the United States, dismissing petitioner's suit.

The findings made by the Court of Claims show that petitioner is a corporation organized under the laws of the State of Illinois and engaged in the manufacture and sale of storage batteries. (R. 19.)

Petitioner between June 3, 1919, and October 20, 1925, paid to the United States as excise taxes with respect to the sale of said storage batteries the amount of $376,324.45. (R. 20–25.) On February

7, 1924, petitioner filed with the Commissioner of Internal Revenue a claim for refund of said taxes in the sum of $304,127.25, which claim was rejected by the Commissioner of Internal Revenue June 24, 1924. On November 27, 1925, petitioner filed with the Commissioner of Internal Revenue claim for refund of said taxes in the sum of $73,266.45, which claim was rejected by the Commissioner February 27, 1926. (R. 26.)

The petitioner sold said batteries principally to dealers and jobbers who were in the business of conducting garages and service stations. Although storage batteries of various types are manufactured and used for various purposes, the storage batteries in question were of the type especially suitable for use on automobiles as replacements for the batteries forming a part of the original equipment of said cars and were not adapted to any other primary purpose or use. Petitioner issued a catalogue in which its batteries were advertised for use in automobiles, in which it broadcasted the slogan, "A Vesta battery for every car," and requested prospective purchasers in ordering batteries to specify the kind of automobile for which the battery was required. Fifteen types of batteries were manufactured and sold by petitioner, any one of which could be used in some automobile. (R. 27–28.)

ARGUMENT

The question raised is very similar to that involved in *Universal Battery Co.* v. *United States*, No. 127, October Term, 1929, now pending in this Court on petition for writ of certiorari to the Court of Claims; and we refer the Court to the argument in the brief for the United States in opposition filed in that case.

In the instant case the findings are more specific than were those in the *Universal Battery* case. In the instant case petitioner argues (Petition, p. 4):

> * * * It was not found that plaintiff's batteries were used on automotive vehicles designated in the taxing statute, nor does it appear that petitioners' batteries were not adaptable for all of the uses enumerated above. Neither was it found that the petitioner's batteries were not used for all of such purposes. (R. 23–24.)

The Court of Claims did, however, find that the batteries manufactured and sold by petitioner "were of the type especially suitable for use on automobiles as replacements for the batteries forming a part of the original equipment of such cars and were not adapted to any other primary purpose or use," and that they were advertised for use in automobiles. (R. 27–28.)

CONCLUSION

For the reasons set forth in the brief for the United States in opposition to the petition for writ of certiorari of Universal Battery Company, we submit that the petition for writ of certiorari in the instant case should be denied.

Respectfully submitted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

R. C. WILLIAMSON,
Attorney.

SEPTEMBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

CONCLUSION

For the reasons set forth in the brief for the United States in opposition to the petition for writ of certiorari of Universal Battery Company, we submit that the petition for writ of certiorari in the instant case should be denied.

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SEPTEMBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

CLERK'S COPY.

Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 350

THE BASSICK MANUFACTURING COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 29, 1929

CERTIORARI GRANTED NOVEMBER 4, 1929

(34,481)

(34,481)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 350

THE BASSICK MANUFACTURING COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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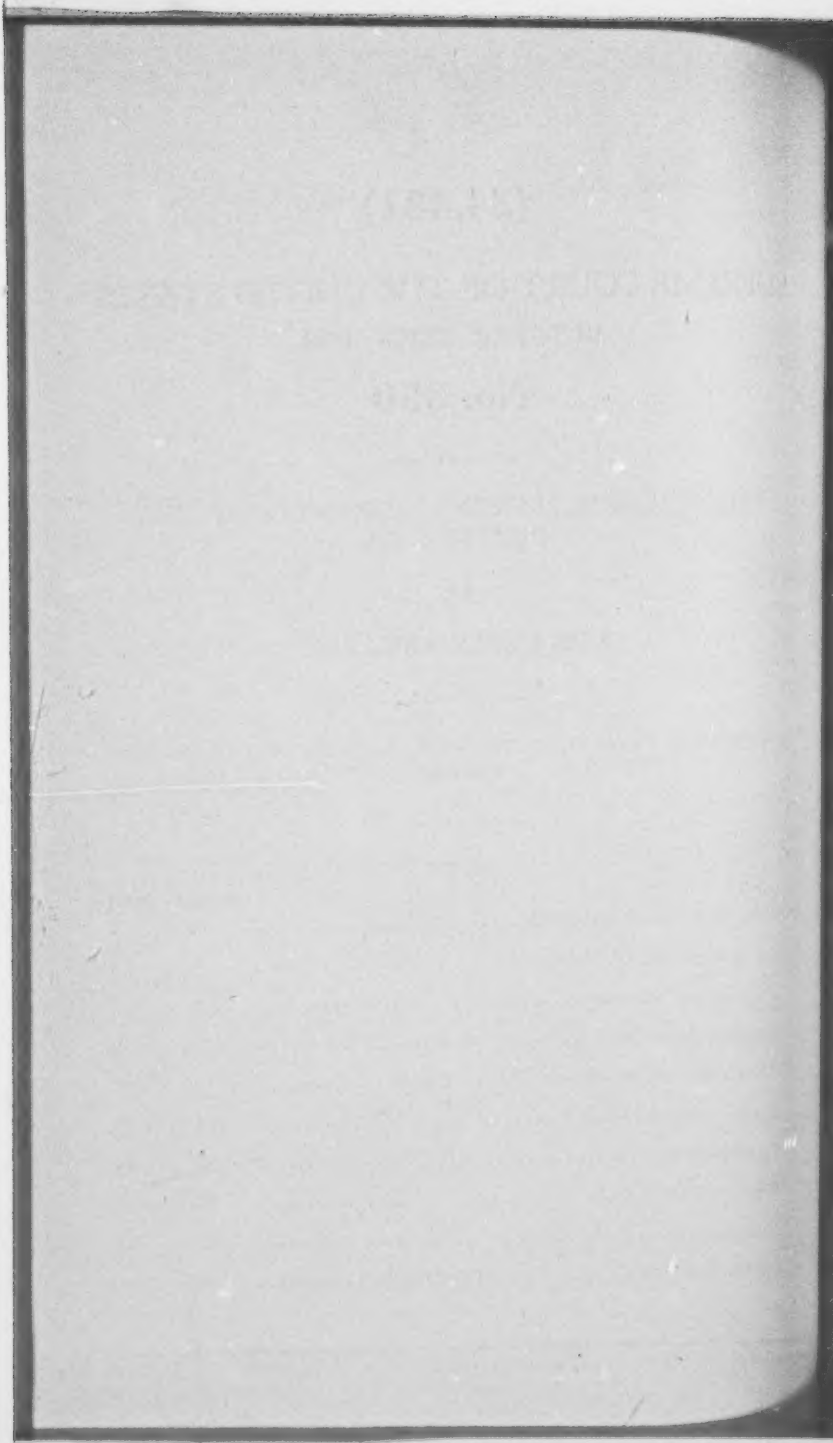
JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 4, 1929



[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 350

THE BASSICK MANUFACTURING COMPANY

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT: Your petitioner, The Bassick Manufacturing Company, by its attorney, respectfully prays for a writ of certiorari to review the judgment of the United States Court of Claims in the above entitled cause.

Statement of the Case

The petitioner manufactures and distributes, among other things, an article or device designated and known commercially as a gascolator. It is a device designed for and used on or in connection with internal combustion engines. It is placed on or attached to the fuel line between the fuel tank and the carburetor of the engine, and its function is to strain the gasoline in order to prevent dirt, water, grit, or any other foreign matter from reaching the carburetor. The gascolator manufactured and sold by petitioner is adaptable for use and in fact is used on or in connection with gasoline engines used for many purposes other than to furnish motive power to automobiles. It is used on engines which operate tractors, motor boats, airplanes, and various kinds of industrial and farming machinery. And a gascolator such as is used on or in connection with an automobile engine is interchangeable and may be used on engines used for any or all of the other purposes above enumerated. While it serves a very useful purpose, it is not in any sense necessary or essential to the operation of any gasoline engine.

On sales of gascolators, as above described, made by pe-
[fol. 2] titioner between September 1, 1922, and February 28, 1926, the Commissioner of Internal Revenue levied and assessed against and collected from petitioner excise taxes in the amount of $15,616.01. Said taxes were levied, assessed, and collected under the provisions of Section 900(3) of the Revenue Act of 1921, 42 Stats. 277, and Section 600(3) of the Revenue Act of 1924, 43 Stat. 253,322, which imposed excise taxes on the sales of "parts" or "accessories" for automobiles. Claim for refund of said taxes was seasonably filed with the Commissioner of Internal Revenue which claim was predicated among other things upon the ground that the gascolators in respect of which they were levied, assessed, collected, and paid were not automobile parts or accessories within the meaning of the Revenue Acts of 1921 and 1924, *supra*. Said claim was rejected or disallowed by the Commissioner of Internal Revenue on April 12, 1927. Subsequently suit for recovery of said taxes was instituted in the Court of Claims. The judgment of said Court dismissing the petition and rendering judgment in favor of the United States was entered on June 10, 1929.

It is the contention of petitioner that the sales of gascolators manufactured by it were not properly taxable as automobile parts or accessories because—

(a) Their cheif use, according to the principle established by this Court in the case of Magone v. Wiederer, 159 U. S. 555, is not on or in connection with automobiles.

(b) They do not come within the provisions of the Revenue Acts of 1921 and 1924. Subdivisions (1) and (2) of Section 900 of the 1921 Act and Section 600 of the 1924 Act imposed excise taxes on the sales of automobiles, both commercial and passenger, and motor cycles. Subdivision (3) of said Sections imposed taxes on the sales of parts or accessories "for any of the articles enumerated in subdivision (1) or (2)". Engines are not therein enumerated, but fall within the provisions of subdivision (3). A gasco-
[fols. 3 & 4] lator at most is but an accessory, and not an essential or necessary accessory, for a gasoline engine. No tax was imposed on sales of parts or accessories for

any of the articles enumerated in subdivision (3), under which sales of automobile engines were taxed.

Reasons Relied on for Allowance of Writ

The writ herein sought should be issued for the following reasons:

1. The Court of Claims has decided an important question of Federal taxation which has not been, but should be, settled by this Court.

2. The decision of the Court of Claims is in conflict with the principle announced by this Court in the case of Magone v. Wiederer, 159 U. S. 555, respecting the application of the rule of chief use to articles in the determination of their taxable status or classification.

3. The effect of the decision of the Court of Claims is to extend by implication the provisions of taxing statutes so as to embrace matters or things not specifically included within their terms and which do not come within the clear import of the language used therein. This in contravention of a long established and settled rule of statutory construction of this Court as announced in Gould v. Gould, 245 U. S. 151, and United States v. Merriam, 263 U. S. 179.

Wherefore your petitioner respectfully prays that a writ of certiorari to review the judgment of the Court of Claims may be granted.

George M. Wilmeth, Attorney for Petitioner, Transportation Building, Washington, D. C.

[fol. 1] In the Court of Claims

No. J-114

The Bassick Manufacturing Company, a Corporation, Claimant,

v.

The United States, Defendant

I. Petition—Filed March 15, 1928

To the Honorable the Court of Claims:

The Claimant, The Bassick Manufacturing Company, respectfully represents to the Court:

I. That it is, and at all times mentioned herein has been, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Chicago, Illinois.

II. That claimant is the manufacturer and distributor, among other things, of a device known as a gascolator, designed for the purpose of straining gasoline used as fuel in internal combustion engines. These devices have been regularly sold to manufacturers of internal combustion engines used in connection with power machines, marine engines, aeroplanes, farm tractors, steam shovels, elevators, etc., as well as to manufacturers of automobiles, and are therefore articles of general commercial use, rather than "parts" or "accessories" for automobiles.

[fol. 2] III. That Section 900 of the Revenue Act of 1921 (42 Stats. 277), provided:

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motor cycles (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;"

Pursuant to the provisions of said Act, on or about January 6, 1922, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated certain regulations, designated and known as

"Regulations No. 47 (Revised)," relating to the Excise Taxes on Sales by the Manufacturer under Section 900 of the Revenue Act of 1921, which said regulations provided, in part, as follows:

"Art. 14. * * * The words 'tires, inner tubes, parts or accessories' shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as 'tires, inner tubes, parts, or accessories,' and shall not be understood to em-[fol. 3] brace raw materials used in the manufacture of such articles. * * *

Art. 15. Definition of Parts.— A 'part' for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, and which is primarily adapted only for use as a *component part of such vehicle.* * * * (Italics supplied.)

Art. 16. Definition of Accessories.—An 'accessory' for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation. * * *"

IV. That Section 600 of the Revenue Act of 1924 (43 Stats. 253, 322) provided as follows:

"On and after the expiration of thirty days after the enactment of this act there shall be levied, assessed, collected and paid, upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both

cases tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), 3 per centum. A sale or lease of an automobile truck or of an automobile wagon shall, for the purposes of this sub- [fol. 4] division, be considered to be a sale of the chassis and of the body;

(2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. This subdivision shall not apply to chassis or bodies for automobile trucks, automobile wagons, or other automobiles;"

And a revised edition of Regulations No. 47 (Revised) promulgated or issued by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, pursuant to the provisions of said Act, on or about August 29, 1924, contains, in Articles 14, 15 and 16, substantially the same definitions and provisions respecting tires, inner tubes, parts, and accessories, as the Regulations promulgated under the Revenue Act of 1921 hereinbefore quoted.

V. Between the dates of October 31, 1922, and March 31, 1926, both dates inclusive, there were levied, assessed against, and collected from Claimant, and paid by Claimant to the United States Collector of Internal Revenue at Chicago, Illinois, taxes in the amount of $15,616.01, on sales by Claimant of gasoline strainers as described in paragraph II hereof. Said taxes were purported to have been levied, assessed, and collected under the provisions or authority of subdivision (3) of Section 900 of the Revenue Act of 1921, [fol. 5] and subdivision (3) of Section 600 of the Revenue Act of 1924.

VI. On or about September 28, 1926, Claimant filed with the Commissioner of Internal Revenue a formal claim for

refund of said sum of $15,616.01, for reasons set forth therein as follows:

"This claim is for sales taxes erroneously paid on the dates as set forth in the schedule annexed hereto, marked schedule 1, in respect of a certain device known as a gascolator. This device is for the purpose of straining gasoline. The taxpayer contends that said gascolators do not constitute parts or accessories within the meaning of Section 900 of the Revenue Act of 1921, or Section 600 of the Revenue Act of 1924. In support of the contention that said articles are and should be exempt from the payment of Excise or Sales taxes, the taxpayer relies upon the following rulings and decisions:

Cum. Bulletin 1923, P. 308—11-22-1076-S. T. 426 re Spark Plugs.

Cum. Bulletin 1923, P. 310—11-17-1025-S. T. 422 re Grease Guns.

Decision of Court of Claims 6/14/1926 in case of Atwater Kent v. U. S., re Timers and Coils.

These devices have been regularly sold to the manufacturers of internal combustion engines used in connection with power machines, marine engines, aeroplanes, farm tractors, steam shovels, elevators, etc. Following is a list of some of the concerns referred to:

Avery Power Machinery Co.,
John Deere Harvester Works,
Guilder Engineering Co.,
Gray Marine Motors Co.,
Ireland Aircraft, Inc.
[fol. 6] J. T. Tractor Co.,
Wisconsin Tractor Co.,
Pioneer Tractors, Inc.,
Marion Steam Shovel Company,
Thomas Elevator Company,
Heath Airplane Company,
U. S. Navy, San Diego, Calif."

VII. The Commissioner of Internal Revenue rejected the aforesaid claim in a letter dated April 12, 1927, reading as follows:

"Treasury Department, Washington

MT:M:JLR.
Cl. 355680.

April 12, 1927.

The Bassick Manufacturing Company, 1828 Diversey Boulevard, Chicago, Illinois.

GENTLEMEN: Reference is made to the claim filed by you for refund of $15,616.01 representing manufacturer's excise tax alleged to have been erroneously paid during the period September, 1922, to February, 1926, inclusive.

The claim is based upon the contention that the tax in question was paid on gascolators which you claim are commercial commodities and do not constitute parts or accessories for automobiles.

You are advised this office holds that the gascolators manufactured by you are automobile parts or accessories, and your sales of these articles during the period covered by your claim were subject to the tax imposed under section 900 (3) of the Revenue Act of 1921 and section 600 (3) of the Revenue Act of 1924.

Your claim is accordingly rejected.

Respectfully, (Signed) D. H. Blair, Commissioner."

EM:mf.

[fol. 7] VIII. Claimant avers that the taxes collected from it on sales of gasoline strainers, as aforesaid, are illegal and erroneous, and were illegally and erroneously assessed and collected by the United States, through said Collector of Internal Revenue at Chicago, Illinois, without warrant or authority of law, for the reason that the said gasoline strainers are not parts or accessories for an automobile or motor cycle, within the meaning of subdivision (3) of Section 900 of the Revenue Act of 1921 and subdivision (3) of Section 600 of the Revenue Act of 1924, but are commercial articles sold for general use.

Wherefore, Claimant claims from the United States the sum of $15,616.01, with interest at the rate of 6 per centum per annum, as provided by law.

IX. No action upon this claim other than herein stated has been had before Congress or any other of the depart-

ments of the Government. Claimant is a citizen of the United States, and it and its officers and directors have at all times borne true allegiance to the Government of the United States, and have not at any time, in any way, aided, abetted or given encouragement to rebellion against said Government; it is the sole owner of the claim herein stated, and no part of such claim has ever been sold, assigned or discharged; and it is justly entitled to the amount herein claimed from the United States after allowing all just credits and off-sets.

The Bassick Manufacturing Company, by T. T. Sullivan, Vice-President. George M. Wilmeth, Transportation Building, Washington, D. C.

[fol. 8] *Duly sworn to by T. T. Sullivan. Jurat omitted in printing.*

[fols. 9 & 10] II. General Traverse—April 24, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission

On May 8, 1929, this case was argued and submitted on merits by Mr. Geo. M. Wilmeth for plaintiffs and Mr. R. C. Williamson for defendants.

[fol. 11] IV. **Special Findings of Fact, Conclusion of Law, and Memorandum by the Court**—Filed June 10, 1929

This case having been heard by the Court of Claims upon the evidence and the report of a commissioner, the court makes the following

Special Findings of Fact

I

The Bassick Manufacturing Company, Inc., during the times hereinafter mentioned was, and now is, a corporation organized, existing, and operating under and by virtue of the laws of the State of Delaware, with its principal place of business located at Chicago, Illinois.

II

Plaintiff and all the officers thereof have at all times borne true allegiance to the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States. Plaintiff is a citizen of the United States, the sole owner of the claim hereinafter stated; no action has been had thereon before Congress or any governmental department, and no part of which has ever been sold or assigned.

III

During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling gascolators (gasoline strainers).

A gascolator is a device designed to be placed between the fuel tank and the carburetor of any internal combustion motor for the purpose of taking out dirt, water, grit, or any foreign matter from the gasoline before it gets to the carburetor, preventing the carburetor from becoming inoperative or not functioning properly. Gascolators were sold by plaintiff to and used, during the period October 31, 1922, to March 31, 1926, by airplane, farm implement, automobile, and industrial machinery manufacturers. Said gascolators were adaptable for use on internal combustion engines, which are used to drive tractors, airplanes, industrial machinery, motor boats, marine boats, and automobiles, and were interchangeable on any combustion engine dependent on the size of the fuel pipe, and the adapter which is a device to connect the fuel pipe to the gascolator.

IV

[fol. 12] During the period October 31, 1922, to March 31, 1926, said gascolators were also sold to companies that only

manufactured farm implements and industrial machinery. The difference in the gascolators sold by plaintiff was in the size of the adapter, which connects the gascolator to the fuel pipe. The gascolator could be attached to the fuel pipe without the adapter by swedging the fuel pipe to the gascolator. Plaintiff issued in November, 1926, a catalogue wherein said gascolator and its various parts are described. Said catalogue advertises a "Ford gascolator," a "Franklin gascolator," and a special "Buick gascolator," and quotes prices therefor. It does not appear from the evidence what, if any, part of the taxes sought to be recovered herein were paid for gascolators sold to automobile manufacturers, or for uses other than for automobiles.

V

Plaintiff made and filed its manufacturer's excise-tax returns monthly for the period September, 1922, to February, 1926, inclusive, showing the amount of tax due thereon which was duly assessed on such returns by the Commissioner of Internal Revenue, paid by plaintiff, for the months, in the amounts, and on the dates hereinafter set forth as follows:

Period	Year	Month	Year	Page	Line	Amount	Date paid
September		October		105	4	$5,433.36	Oct. 28, 1922
October	1922	December	1922	2	1	4,132.48	Dec. 1, 1922
November		December		128	0	3,641.64	Dec. 27, 1922
December		January		119	7	2,055.83	Jan. 27, 1923
January		February		112	2	3,231.64	Feb. 26, 1923
February		March		103	7	7,879.78	Mar. 27, 1923
March		April		108	8	7,844.07	Apr. 26, 1923
April		June		0	7	3,417.35	June 1, 1923
May		June		111	2	3,982.35	June 29, 1923
June		August	1923	0	8	1,138.96	Aug. 1, 1923
July	1923	August		108	3	860.59	Aug. 29, 1923
August		September		96	1	1,406.83	Sept. 27, 1923
September		October		117	8	2,232.31	Oct. 30, 1923
October		November		110	8	1,955.98	Nov. 28, 1923
November		December		112	4	1,026.29	Dec. 28, 1923
December		January		122	2	1,047.07	Jan. 29, 1924
January		February		139	0	781.70	Feb. 29, 1924
February		April		11	8	763.93	Mar. 31, 1924
March		April		158	6	1,096.17	Apr. 29, 1924
April		May		120	6	1,582.19	May 27, 1924
May		July	1924	1	5	1,620.80	July 1, 1924
June		July		127	6	1,083.88	July 31, 1924
July	1924	September		22	7	227.26	Sept. 6, 1924

August	1925	September	1925	52	4	656.41	Sept. 26, 1924
September		October		55	3	426.70	Oct. 30, 1924
October		December		11	3	381.27	Dec. 5, 1924
November		December		40	3	197.62	Dec. 24, 1924
December		January	1926	58	9	164.38	Jan. 31, 1925
January	1926	March		1	8	151.09	Mar. 3, 1925
February		March		50	2	417.03	Mar. 31, 1925
March		April		46	6	707.04	Apr. 28, 1925
April		May		43	6	499.69	May 29, 1925
May		June		51	2	928.77	June 30, 1925
June		July		48	1	1,005.80	July 29, 1925
July		September		1	3	807.82	Sept. 1, 1925
August		October		0	7	739.09	Oct. 1, 1925
September		October		49	0	589.75	Oct. 31, 1925
October		December		2	6	531.81	Dec. 1, 1925
November		December		52	6	476.29	Dec. 31, 1925
December		January	1927	39	9	1,031.15	Jan. 29, 1926
January	1927	March		5	6	273.23	Mar. 2, 1926
February		April		0	3	571.05	Apr. 1, 1926

[fols. 13 & 14] VI

On September 29, 1926, plaintiff filed its claim for refund #355680 of manufacturer's excise tax so paid on gascolators (gasoline strainers) for the period September, 1922, to February, 1926, inclusive, in the amount of $15,616.01, which was duly rejected by the Commissioner of Internal Revenue on April 12, 1927.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

MEMORANDUM

This case is controlled by the decisions of this court in Walker Manufacturing Co. v. United States, 65 C. Cls. 394; Cole Storage Battery Co. v. United States, 65 C. Cls. 164; Advance Automobile Accessories Corp. v. United States, No. H-3, decided October 22, 1928; Borg and Beck Co. v. United States, No. H-437, decided March 11, 1929; Edison Storage Battery Co. v. United States, No. F-359, decided May 6, 1929; Fairmont Tool and Forging Company v. United States, No. J-106, decided June 3, 1929.

Plaintiff's petition should be dismissed It is so ordered.

[fol. 15] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 10th day of June, A. D. 1929, judgment was ordered to be entered as follows:

Upon the Special Findings of Facts, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and the petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law, which amount is found to be $49.21.

[fol. 16] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,481. Court of Claims. Term No. 350. The Bassick Manufacturing Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed August 29, 1929. File No. 34,481.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 4, 1929

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is assigned for argument with cases Nos. 127 and 275 as one case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States.

October Term, 1929.

No. 350.

THE BASSICK MANUFACTURING COMPANY, *Petitioner*,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Court of Claims on June 10, 1929, filed its special findings of fact, conclusion of law and brief memorandum opinion (not yet reported but found in the printed record, pp. 9–15) deciding, as a conclusion of law, that plaintiff was not entitled to recover, and dismissed its petition and entered judgment accordingly (R. 14–15). The question presented involves the construction of Section 900(3) of the Revenue Act of 1921 (42 Stat. 227, 291), and Section 600(3) of the Revenue Act of 1924 (43 Stat. 253, 322) imposing taxes on sales of parts and accessories for automobiles and is one that has not been settled but should be in as much as it affects a large number of manufacturers, producers, and importers and a great variety of articles. The jurisdiction of the Court is invoked under §288 (a) and (b), Chap. 7, Title 28, U. S. C.

STATEMENT OF THE CASE.

Petitioner is a manufacturer and distributor, among other things, of a device or article commercially designated and known as a gascolator. This is a device used on or in connec-

tion with gasoline engines. It is connected with the fuel or feed line at some point between the gasoline tank and the carburetor and its purpose or function is to strain the gasoline so as to prevent dirt, water, grit, or other foreign matter from reaching the carburetor. The gascolator manufactured and sold by petitioner is adaptable for use and is used not only on automobile engines, but also on engines used to propel airplanes, motor boats, and to operate various kinds of industrial and agricultural machinery. And a gascolator used on an automobile engine is equally adaptable for use on a gasoline engine used for any other purpose.

Section 900(3) of the Revenue Act of 1921 (Ch. 136, 42 Stat. 227, 291) imposed an excise tax equivalent to 5% of the price for which parts or accessories for automobiles were sold (see R. 4 for text of statute). Section 600(3) of the Revenue Act of 1924 (Ch. 234, 43 Stat. 253, 322) continued this tax in force, but reduced the rate to 2½% (R. 6). The Commissioner of Internal Revenue held that the taxes imposed by said sections applied to sales of gascolators made by petitioner; in other words, that the gascolator manufactured and sold by petitioner was a part or accessory for an automobile, notwithstanding the fact, clearly established by the record, that it was adaptable and generally used for other purposes. Accordingly, taxes amounting to $15,616.01 were assessed against and collected from petitioner on gascolator sales made during the period September, 1922, to February, 1926.

The question is whether a gascolator as herein described, or any other article adaptable as well for use on other machines as on automobiles, is subject to the tax imposed on sales of automobile parts or accessories by the Revenue Acts of 1921 and 1924, *supra*. The Court of Claims in its brief memorandum opinion simply said (R. 14):

> "This case is controlled by the decision of this court in *Walker Manufacturing Co.* v. *United States*, 65 C. Cls. 394; *Cole Storage Battery Co.* v. *United States*, 65 C. Cls. 164; *Advance Automobile Accessories Corp.* v. *United States*, No. H–3, decided October 22, 1928; *Borg and Beck Co.* v. *United States*, No. H–437, decided March 11, 1929; *Edison*

Storage Battery Co. v. *United States*, No. F-359, decided May 6, 1929; *Fairmount Tool and Forging Company* v. *United States*, No. J-106, decided June 3, 1929."

The cases above cited and relied upon by the Court of Claims will be hereinafter discussed.

ARGUMENT.

I.

The decision of the Court of Claims involves a question, and a very important question, of Federal taxation which has not been but should be settled by this court because it affects a large number of manufacturers, producers and importers, and innumerable articles the use of which in relation to automobiles is similar to if not identical with that of the article here involved.

Petitioner does not deny that its product—gascolator—is a useful and desirable accessory for an automobile engine. Indeed, it advertises and holds it out to the automotive trade as such. But it is not a necessary accessory and its utility is not limited to automobile engines or motors. It is sold by petitioner to and used by owners of gasoline engines used for the propulsion or operation of many and various kinds of machines. So are gascolators manufactured and sold by other manufacturers. And, likewise, the principle laid down by the Court of Claims in this case, if permitted to stand, necessarily will apply to other articles which may be and no doubt are useful to automobile operators, but which also are convenient and useful to owners and operators of other machines which do not come within the purview of the taxing Acts. Obviously, it would be futile if not impossible to attempt to enumerate all of the articles which would come within this principle. An example or two, it is believed, will suffice. For instance: a hammer, a monkey-wrench, an oil can, a screw-driver. Each and every one of these tools or implements will ordinarily be found in the tool chest of automobile owners. This is a matter of which it is believed the court may properly take judicial notice. And we believe

also that the court will take judicial notice of the fact that each and every one of the tools or implements mentioned is useful, if not necessary, to owners or operators of machines other than automobiles. For example, any or either of them may be and frequently are used by owners and operators of lawn mowers and threshing machines.

II.

The provisions of the taxing statutes should be restricted to articles the principal or chief use of which is limited to automobiles.

This proposition is so firmly established by a long line of decisions by this court that it seems unnecessary to discuss it at length. In *Magone* v. *Wiederer*, 159 U. S. 555, will be found a review of the adjudications of the court as to the rule of chief or predominant use in determining the classification of an article for tax purposes. In that case the question was whether glass cut to certain sizes and shapes were "parts" of clocks. On this question the court below charged the jury as follows:

> "In determining this question, whether or not these articles are parts of clocks, it will not be necessary for you to say that they were exclusively used for that purpose. An article may be chiefly used for a certain purpose and be diverted from its principal use; somebody may put it to a purpose for which it was not originally intended. That could not, in my judgment, change its tariff nomenclature. The Supreme Court, in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury 'that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute. * * *' And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks, that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they are articles, all, or one or more, as the case may be, which have no distinguishing char-

> acteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles your verdict should be for the defendant."

This charge was sustained by this Court which in its opinion, delivered by Mr. Justice White, said:

> "The charge given by the court below, and which was excepted to, was manifestly correct, for in giving the rule of chief use the principles by which chief use was to be ascertained were fully stated exactly in accordance with the law subsequently announced by this court in *Magone* v. *Heller*. * * *"

While *Magone* v. *Wiederer* and the cases therein cited and referred to, related to the classification for tax purposes of articles under customs tariff acts, it is respectfully submitted that the principle is equally applicable in the determination of the taxable status of articles under internal revenue laws. This was recognized by the Court of Claims in *Atwater Kent Manufacturing Co.* v. *United States*, 62 C. Cls. 419. In that case the question presented was whether timers and coils for internal combustion engines were taxable under the very provision of the Revenue Act of 1921 (Section 900 (3)) under the purported authority of which the taxes here involved were assessed and collected. The Court of Claims having found as a fact that said timers and coils were adaptable for use on internal combustion engines other than those used for the propulsion of automobiles, held that plaintiff was entitled to recover. In the opinion of the court, delivered by Chief Justice Campbell, after quoting from *Magone* v. *Wiederer*, *supra*, it was stated:

> "The principle is applicable here when we come to define the meaning of the word parts in the acts in question.

> Where the articles, as those we are concerned with, are applicable for use in different kinds of machines or appliances and are just as applicable to the one use as to the other they are not distinctively parts of automobiles so as to be taxable under these statutes."

And to the same effect was the decision of the Court of Claims in *Milwaukee Motor Products Co.* v. *United States*, No. H–40, decided October 22, 1928.

The decision of the Court of Claims in the case at bar is in direct conflict with its decision in *Atwater Kent Manufacturing Co.* v. *United States*, *supra*. Moreover, there is even stronger reason for the application of the principle announced in *Magone* v. *Wiederer* to the present case than existed in the case of *Atwater Kent Manufacturing Co.* v. *United States* because timers and coils are essential to the operation of gasoline engines whereas a gascolator, such as is here involved, is not essential.

III.

The provisions of statutes imposing taxes are not to be extended, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out.

From the time of *U. S.* v. *Wigglesworth* (2 Story, 369), to the present date the canon that the provisions of statutes, particularly taxing statutes, are not to be extended by implication, has been uniformly accepted and applied without exception. In *Gould* v. *Gould* (245 U. S. 151), the court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

In support of this the court cited:

U. S. v. *Wigglesworth*, 2 Story, 369.
Am. Net and Twine Co. v. *Worthington*, *141 U. S.* 468.
Benziger v. *U. S.*, 192 U. S. 38.

See also:

U. S. v. *Temple*, 105 U. S. 96.
U. S. v. *Standard Brewery*, 221 U. S. 220.
U. S. v. *Field*, 255 U. S. 257.
U. S. v. *Merriam*, 263 U. S. 179.
Schwab v. *Doyle*, 258 U. S. 529; 66 Law ed. 747.

And in *United States* v. *Merriam*, 263 U. S. 179, the Court said:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

Clearly the decision of the Court below runs counter to this settled principle of statutory construction. The statutes here involved imposed taxes on sales of parts for articles enumerated in subdivisions (1) and (2) of Sections 900 and 600, namely automobiles and motor cycles. A gascolator is not a part for any of the articles therein enumerated. At most it is only a part for an automobile engine, one of the articles embraced in subdivision (3). No tax was imposed upon parts or accessories for articles enumerated in subdivision (3), hence the effect of the decision of the Court of Claims is to read into the statutes something which the Congress did not say and thereby extend their provisions beyond the clear import of the language used.

IV.

The cases cited by the Court of Claims in support of its decision are not in point.

The case of *Walker Manufacturing Co.* v. *United States*, 65 C. Cls. 394, involved the question of the taxability of lifting jacks especially designed and advertised for use in connection with automobiles, and for no other purpose. The gascolator manufactured and sold by petitioner is not so limited in its use.

Cole Storage Battery Co. v. *United States*, 65 C. Cls. 164, had to do with storage batteries especially designed and advertised for use on or in connection with automobiles. Whether or not they could be used for other purposes, it is a matter of common knowledge that they are necessary to the operation of an automobile propelled by a gasoline engine. A gascolator is not necessary to an automobile engine, but may be and is used generally on various kinds of gasoline engines.

Advance Automobile Accessories Corp. v. *United States*, No. H–3, decided October 22, 1928, is readily distinguishable from the case at bar in that it involved the question of whether repair material (brake and transmission band lining) was subject to tax. This material was used exclusively in the repair of automobiles; that is, to replace worn out brake or transmission band linings. In the form in which sold and taxed it was useful for no other purpose.

Borg and Beck Co. v. *United States*, No. H–437, decided March 11, 1929. This related to clutches especially designed for use on automobile engines.

Edison Storage Battery Co. v. *United States*, No. F–359, decided May 6, 1929. Same in effect as *Cole Storage Battery Co.* v. *United States*, *supra*.

None of the above cases involved the question here presented. This question, it is respectfully submitted, should be settled by the principle laid down in *Magone* v. *Wiederer*, *supra*, which was recognized and followed by the Court of Claims in *Atwater Kent Manufacturing Co.* v. *United States*, and also in

the case of *Milwaukee Motor Products Co.* v. *United States*, No. H–40, decided October 22, 1928.

CONCLUSION.

For the reasons set forth above it is respectfully submitted that this court should grant this petition and review the judgment of the Court of Claims in this case.

Respectfully submitted,

GEORGE M. WILMETH,
Attorney for Petitioner.

Washington, D. C.

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Supreme Court of the United States.

OCTOBER TERM, 1929.

No. 350.

THE BASSICK MANUFACTURING COMPANY, *Petitioner*,

v.

THE UNITED STATES.

No. 351.

F. W. STEWART MANUFACTURING CORPORATION, *Petitioner*,

v.

THE UNITED STATES.

No. 352.

GEMCO MANUFACTURING COMPANY, *Petitioner*,

v.

THE UNITED STATES.

BRIEF FOR PETITIONERS.

STATEMENT OF THE CASES.

DECISIONS OF THE LOWER COURT.

GEORGE M. WILMETH,
Attorney for Petitioners.

Washington, D. C.,
December 23, 1929.

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THE UNITED STATES.

BRIEF FOR PETITIONERS.

STATEMENT OF THE CASES.

DECISIONS OF THE LOWER COURT.

The opinions of the Court of Claims in the above-entitled cases have not yet been reported. They are to be found, however, in the records of the several cases as follows: The Bessick Manufacturing Company (No. 350), page 14; F. W. Stewart Manufacturing Corporation (No. 351), page 12; Gemco Manufacturing Company (No. 352), page 9. For the sake of brevity the several cases will be hereinafter designated or referred to as the Bassick case (No. 350), the Stewart case (No. 351), and the Gemco case (No. 352).

The Statutes.

Section 900 of the Revenue Act of 1918 (40 Stats. 1122), provided:

> That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> (1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), excepting tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum.

Section 900 of the Revenue Act of 1921 (42 Stat. 227, 291), re-enacted or continued in force without change effective from and after January 1, 1922, the taxes imposed by Section 900 of the Revenue Act of 1918, *supra*, and Section 600 of the Revenue Act of 1924 (43 Stats. 227, 322), is in substance the same, except that the rate of tax was reduced.

All of the taxes involved in the above-entitled cases were levied, assessed, and collected under subdivisions (3) of Sections 900 and 600 of the respective Acts on the theory that the articles taxed were parts or accessories for automobile trucks, automobile wagons, other automobiles, and motorcycles.

The Articles Involved.

The taxes collected from and paid by the Bassick Company (No. 350) were assessed and collected on sales of an artic

designated and known commercially as a gascolator, which is gasoline filter or strainer. It is an accessory for a gasoline engine or motor. The use of this article is not limited or restricted to engines or motors used on automobiles, nor is it essential to their operation. On the contrary, it is adaptable for use and is used generally on or in connection with gasoline engines used to operate motor boats, airplanes, and all kinds of industrial and agricultural machinery (Special Finding of Fact No. III, R. 10).

In the case of the Stewart Company (No. 351) the taxes were imposed and collected on sales of certain repair or replacement parts (viz: gears, flexible drive chains, and drive chain housings) for automobile speedometers. This company does not manufacture or sell complete automobile speedometers (Special Finding of Fact No. II, R. 11).

The taxes involved in the Gemco case (No. 352) were assessed and collected on sales of repair or replacement parts for automobile bumpers. The company manufactures and sells not only complete bumpers, but also replacement parts therefor, such as bars, brackets, and fitting (Special Finding of Fact No. II, R. 8).

Questions Presented.

First. Is an article (gascolator in this instance) which is adaptable for use and actually used on or in connection with various kinds of machines other than automobiles and motorcycles subject to the taxes imposed by subdivisions (3) of the sections of the Acts hereinbefore cited solely because such article may or can be used on or in connection with an automobile or motorcycle?

Second. Is the tax imposed by subdivision (3) of Sections 900 of the Revenue Acts of 1918 and 1921 and subdivision (3) of the Revenue Act of 1924, *supra*, applicable to sales of parts or accessories for articles enumerated in *subdivision (3)*, or only to sales of parts or accessories for articles enumerated in *subdivisions (1) and (2)*, as specifically stated by the taxing statutes?

Both of the questions stated are involved in the Bassick case (No. 350), whereas only the second question is presented in the Stewart (No. 351) and Gemco (No. 352) cases.

Errors Assigned.

I.

In the Bassick case (No. 350) the Court of Claims erred in finding and including in its Special Finding of Fact No. IV (R. 10-11) that—

> It does not appear from the evidence what, if any part of the taxes sought to be recovered herein were paid for gascolators sold to automobile manufacturers, or for uses other than for automobiles.

II.

In each of the three cases the Court of Claims erred in deciding as a conclusion of law, upon its special findings of fact, that plaintiffs (petitioners here) were not entitled to recover and dismissing their petitions.

The Contentions.

The petitioner's contention in the Bassick case (No. 350) is that the findings of the Court below, which are conclusive on this Court, establish the fact that gascolators are used principally or chiefly for other than automobile purposes.

The defendant contends that petitioner has failed to prove facts establishing the invalidity of the taxes sought to be recovered.

In the Stewart case (No. 351) and Gemco case (No. 352) petitioners contend that neither of the statutes under which the taxes involved were assessed and collected imposed any tax in respect of the sales of parts or accessories for articles enumerated in subdivision (3) of the applicable sections of said statutes.

The defendant urges that any article, *or any part therefor*, comes within the provisions of the Acts if adaptable for use on or in connection with an automobile.

ARGUMENT.

The Bassick case (No. 350), which presents the primary question of whether a gascolator, or other article adaptable for various uses, is distinctively a part or accessory for an automobile, will be first discussed.

I.

THE RECORD SHOWS CONCLUSIVELY THAT THE PRINCIPAL OR CHIEF USES FOR THE GASCOLATORS MANUFACTURED AND SOLD BY PETITIONER ARE FOR OTHER THAN AUTOMOBILE PURPOSES.

In its Special Finding of Fact No. III (R. 10), the Court below found as follows:

> During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling gascolators (gasoline strainers).
>
> A gascolator is a device designed to be placed between the fuel tank and the carburetor of any internal combustion motor for the purpose of taking out dirt, water, grit, or any foreign matter from the gasoline before it gets to the carburetor, preventing the carburetor from becoming inoperative or not functioning properly. Gascolators were sold by plaintiff to and and used, during the period October 31, 1922, to March 31, 1926, by airplane, farm implement, automobile, and industrial machinery manufacturers. Said gascolators were adaptable for use on internal combustion engines, which are used to drive tractors, airplanes, industrial machinery, motor boats, marine boats, and automobiles, and were interchangeable on any combustion engine dependent on the size of the fuel pipe, and the adapter which is a device to connect the fuel pipe to the gascolator.

It is worthy of note that automobiles are only one of many different classes of machines mentioned by the Court as being operated by internal combustion engines on which the gascolator is used. It is submitted that this Court may properly take judicial notice of the fact that innumerable kinds of industrial machinery and farm implements, both of which are mentioned in the finding above quoted, are in daily use; so it is deemed unnecessary to burden the Court with an attempted enumeration of such machines and implements.

1. This Finding of Fact Clearly Brings the Article under Consideration Within the Rule of Chief Use Adopted by this Court.

This rule or principle is announced in *Magone* v. *Wiederer*, 159 U. S. 555. The question there involved was whether glass cut to certain sizes and shapes were "parts" of clocks. On this question the Court below charged the jury as follows:

> "In determining this question, whether or not these articles are parts of clocks, it will not be necessary for you to say that they were exclusively used for that purpose. An article may be chiefly used for a certain purpose and be diverted from its principal use; somebody may put it to a purpose for which it was not originally intended. That could not, in my judgment, change its tariff nomenclature. The Supreme Court, in a case which I think is somewhat similar upon the facts, although relating to different sections of the statute, sustained a charge to the jury 'that the use to which the articles were chiefly adapted and for which they were used determined their character within the meaning of the statute. * * *' And so I will say to you, as the law of the case, as I understand it, that if you find that these articles were chiefly used as parts of clocks, that that would determine their tariff classification. But it is entirely clear, upon the other hand, that they must be chiefly and principally used for that purpose. If they

> are articles, all, or one or more, as the case may be, which have no distinguishing characteristics, which are just as applicable for use in fancy boxes or in coach lamps as they are for clocks, just as applicable to the one use as to the other, then it would be entirely proper to say that they have no distinguishing characteristics as parts of clocks. They might be used for one purpose just as well as for another. And if you find as to those articles, or any of them, that they have several uses to which they are perfectly applicable, then as to those articles your verdict should be for the defendant."

This charge was sustained by this Court which in its opinion, delivered by Mr. Justice White, said:

> "The charge given by the court below, and which was excepted to, was manifestly correct, for in giving the rule of chief use the principles by which chief use was to be ascertained were fully stated exactly in accordance with the law subsequently announced by this court in *Magone* v. *Heller*. * * *"

The principle announced in *Magone* v. *Wiederer* was recognized and followed by the Court of Claims in *Atwater Kent Manufacturing Co.* v. *United States*, 62 C. Cls. 419. In that case the question was whether timers and coils for internal combustion engines were taxable under the very provisions of the Revenue Act of 1921 (Section 900 (3)) under which a portion of the taxes here involved were assessed and collected. The Court of Claims having found as a matter of fact that timers and coils were adaptable for use on internal combustion engines other than those used for the operation of automobiles, held that plaintiff was entitled to recover. In the opinion of the court, delivered by Chief Justice Campbell, after quoting from *Magone* v. *Wiederer, supra*, it was held:

> "The principle is applicable here when we come to define the meaning of the word parts in the acts in question. Where the articles, as those we are con-

cerned with, are applicable for use in different kinds of machines or appliances and are just as applicable to the one use as to the other they are not distinctively parts of automobiles so as to be taxable under these statutes."

See also, to the same effect, *Milwaukee Motor Products, Inc.*, v. *United States*, 66 C. Cls. 295, *Wells Mfg. Co.* v. *United States*, 66 C. Cls. 283, and *Berg Bros. Mfg. Co.* v. *United States*, 67 C. Cls. 165.

The decision of the Court below in the Bassick case (No. 350) is in direct conflict with its decisions in the cases above cited. Timers and coils are essential to the operation of internal combustion engines whereas a gascolator is not. Therefore, there is added reason for the application of the sound principle followed by the Court of Claims in the *Atwater Kent* and other cases to the present case.

2. No tax was imposed on the sale of parts and accessories to automobile manufacturers.

The Court below in its Special Finding of Fact No. IV (R. 11) found that:

> "It does not appear from the evidence what, if any, part of the taxes sought to be recovered herein were paid for gascolators sold to automobile manufacturers, or for uses other than for automobiles."

It is manifest that the defendant relies upon this finding of fact to support its contention that petitioner has failed to sustain "the burden imposed upon it of showing that the taxes which it seeks to recover were imposed on nontaxable articles." (Brief in opposition to petition for writ of certiorari, p. 8.)

The answer to this, it seems to us, is simple, viz: The Acts under which the taxes in controversy were collected by defendant imposed no tax on sales of parts or accessories to automobile manufacturers. The pertinent provisions of the Acts are as follows (quoting from the Revenue Act of 1921):

"(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), *sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2)*, 5 per centum;" (Italics supplied.)

Since no tax was imposed on sales of parts or accessories to manufacturers or producers of articles enumerated in subdivision (1) or (2)—namely, automobiles and motorcycles—the necessary and inevitable inference resulting as a conclusion of law is that the taxes which petitioner seeks to recover were paid in respect of sales to others than automobile manufacturers. To hold otherwise would place upon the plaintiff (petitioner) the burden of proving a negative.

II.

The second question for the determination of the Court involves a consideration of Sections 900(3) of the Revenue Acts of 1918 and 1921 and Section 600(3) of the Revenue Act of 1924, *supra;* That is to say, did these Acts impose any tax on sales of parts or accessories for articles enumerated in subdivision (3), or only on sales of parts or accessories for articles enumerated in subdivision (1) and (2) of the sections mentioned. The answer to this question will determine and dispose of the Stewart case (No. 351) and the Gemco case (No. 352). The Bassick case (No. 350) also presents the same question; but it is respectfully submitted that this question, in so far as the determination of the latter case is concerned, is secondary, to say the least, and that the reasons hereinbefore urged should be in themselves sufficient to sustain a reversal of the decision of the Court below. However, the Court is requested respectfully to give consideration to the arguments hereinafter advanced to the Bassick case (No. 350) as well as to the other cases (Nos. 351 and 352).

NEITHER SECTIONS 900 OF THE REVENUE ACTS OF 1918 AND 1921, NOR SECTION 600 OF THE ACT OF

1924, IMPOSED A SALES TAX ON PARTS OR ACCESSORIES FOR ARTICLES ENUMERATED IN SUBDIVISION (3) OF THE SECTIONS MENTIONED.

For the convenience of the Court Section 900 of the Revenue Act of 1918 (40 Stats. 1122) is again quoted (and it will be remembered that the provisions of subdivision (3) of this Act are identical with the corresponding subdivisions of the Acts of 1921 and 1924):

> That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased——
>
> (1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum: * * *

1. What, Then, Are the Articles Enumerated in Subdivisions (1) and (2) of the Applicable Sections of the Acts Mentioned for which Parts or Accessories are Taxable?

The answer to this question is to be found in the decision of the Court below in the case of *Martin Rocking Fifth Wheel Co.* v. *United States*, 60 C. Cls. 466, wherein the Court below, interpreting the same provision of the taxing statutes here involved, said:

> " 'Parts,' as used in that paragraph, are 'parts' *for* (italics ours) the articles enumerated in paragraphs (1) and (2), which are 'automobile trucks,' 'automo-

bile wagons,' 'other automobiles,' and 'motor cycles,' 'except tractors'."

The Court of Claims held, in the case of the *Auburn Rubber Co.* v. *The United States* (H-433), decided February 4, 1929, that blow-out patches and reliners for tires were not taxable as parts or accessories for articles enumerated in subdivision (1) or (2). Obviously, the only theory on which this decision can be based is that the products involved are not accessories for articles enumerated in subdivision (1) or (2), *but are accessories for tires, enumerated in subdivision* (3). Petitioner submits that if "accessories" for articles enumerated in subdivision (3) are not subject to the tax imposed by that subdivision, then it necessarily follows that "parts" for articles enumerated in subdivision (3) are nontaxable for the same reason.

In the case of the *National Rubber Filler Co.* v. *The United States*, 63 C. Cls. 337, the product, rubber filler for tires, was neither a part nor an accessory for any of the vehicles enumerated in subdivision (1) or (2). It was an accessory for a tire, enumerated in subdivision (3), and the Court of Claims held that it was not within the power of the Commissioner of Internal Revenue to extend the provisions of the taxing statute so as to bring such a product within its scope. In discussing the question of whether the words "parts" and "accessories" used in the taxing statutes could be properly construed to include the rubber filler involved, the Court said:

> "Beyond doubt the articles enumerated specifically in subdivision (3) of Section 900 have no common meaning. Otherwise it would have been unnecessary to specify. In similar revenue legislation the same course has been pursued by Congress, and articles subjected to taxation carefully enumerated specifically. Reference to an article by its fixed trade name was obviously not intended to reach another not so known or even so designated by the trade to which it is inseparably connected * * * Surely not every article used in con-

nection with a motor vehicle was intended to be taxed by the statute here involved. * * * Congress did not mention it in the statutes, and the doubt as to inclusion therein is made evident by the course of this proceeding."

2. The Decisions of the Court Below in Effect Extends the Provisions of the Acts Beyond the Clear Import of the Language Used.

No rule of statutory construction is more firmly established than the rule that in the interpretation of statutes levying taxes their provisions are not to be extended beyond the clear import of the language used. In *Gould* v. *Gould*, 245 U. S. 151, the Court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

And in *United States* v. *Merriam*, 263 U. S. 179, the Court said:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms of expression. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer."

This rule was followed by the Court of Claims in the *Atwater Kent Manufacturing Co.* case, *supra;* but clearly its decisions in the instant cases runs counter to this settled principle of statutory construction.

The statutes here involved imposed taxes on sales of parts or accessories for articles enumerated in subdivisions (1) and (2) of Sections 900 and 600, namely, automobiles and motorcycles. A gascolator is not a part for any of the articles therein enumerated. It is an accessory which may be used on, but is not essential to, an engine used on an automobile. Such an engine is not enumerated in subdivisions (1) and (2), but falls within the provisions of subdivision (3) as a part for articles enumerated in the preceding subdivisions (1) and (2). Since no tax was imposed upon sale of parts or accessories for the articles enumerated in subdivision (3), the effect of the decision of the Court below is to extend the provisions of the Acts to embrace matters not specifically pointed out.

The use of the words "tires" and "inner tubes" in subdivision (3), in conjunction with the words "parts" or "accessories," would seem to prove conclusively that the term "articles enumerated in subdivisions (1) and (2)" was meant to refer only to the complete vehicles on which tires and inner tubes could be used. Manifestly, there could not be a tire or inner tube for a speedometer or bumper or any other accessory, but only for a truck, automobile or motorcycle.

CONCLUSION.

For the reasons hereinbefore stated, it is respectfully submitted that the judgments of the Court of Claims were wrong. They should be reversed.

Respectfully submitted,

GEORGE M. WILMETH,
Attorney for Petitioners.

Washington, D. C.,
December 23, 1929.

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No. 350

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE BASSICK MANUFACTURING COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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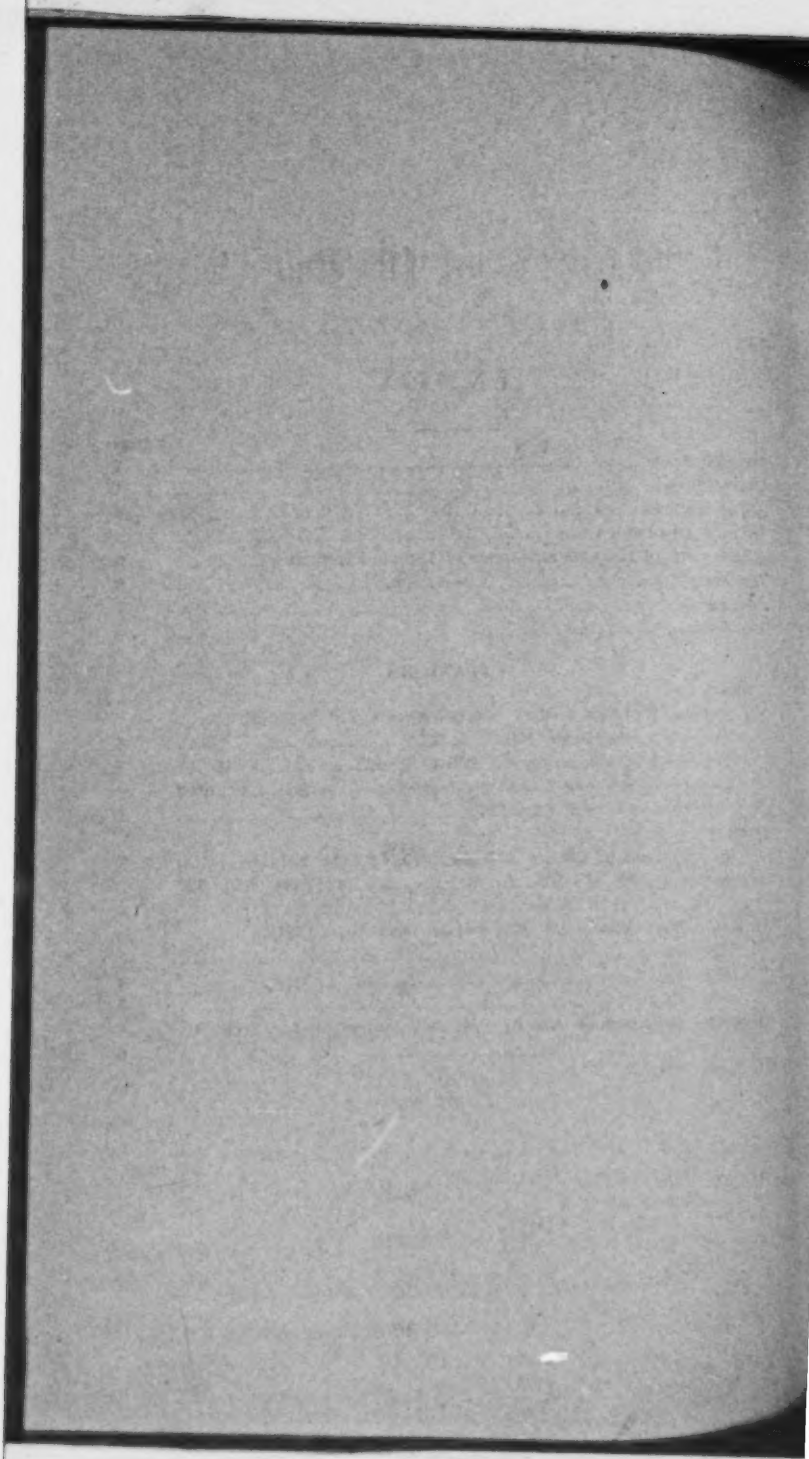

In the Supreme Court of the United States

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THE BASSICK MANUFACTURING COMPANY, PETITIONER

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THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the Court of Claims (R. 14) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered June 10, 1929. (R. 14, 15.) Petition for writ of certiorari was filed August 29, 1929. (R. 15.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner established in the court below that the gascolators (gasoline straining devices)

which were manufactured and sold by it during the period from September 1, 1922, to February 28, 1926, and which were adaptable for use on automobile engines and other engines were not automobile "parts" or "accessories" within the meaning of Section 900 (3) of the Revenue Act of 1921 and Section 600 (3) of the Revenue Act of 1924, and of the regulations of the Commissioner of Internal Revenue issued under the authority of those Acts.

STATUTES INVOLVED

Section 900 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 291, so far as applicable, provides:

> That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> (1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;
>
> (2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;
>
> (3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of

any of the articles enumerated in subdivision (1) or (2), 5 per centum;

* * * * *

Section 600 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 322 (U. S. C. title 26, sec. 881), follows Section 900 of the Act of 1921 in substance.

REGULATIONS OF THE COMMISSIONER OF INTERNAL REVENUE

Article 14 of Treasury Regulations 47 (revised December, 1921), issued under the 1921 Act, is in part as follows:

Tires, inner tubes, parts, and accessories sold to manufacturers.—The words "tires, inner tubes, parts, or accessories" shall be understood to embrace only such tires, inner tubes, parts, or accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially know as "tires, inner tubes, parts, or accessories," and shall not be understood to embrace raw materials used in the manufacture of such articles.

Unvulcanized sheet rubber, liquid rubber vulcanizing cement, and friction fabrics are considered raw materials, and are exempt from tax.

Any article which has reached a state of manufacture wherein it is in itself a component part or accessory, and is of such a nature that it may be used or attached by an ordinary repair man or individual user as distinguished from a manufacturer or producer, is subject to tax as a "part or accessory."

Article 15 is in part as follows:

Definition of parts.—A "part" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

The term includes bodies, wheels, engines, springs, axles, radiators etc. When sold separately a side car and a so-called trailer or "semitrailer" so designed that a portion of the load or the weight thereof is carried or borne by the tractor or "semitractor" are taxable as "parts."

Mere stock or commercial commodities, such as bolts, nuts, washers, screws, etc., though used as components for such vehicles, are not "parts" within the meaning of subdivision (3). Articles, however, which ordinarily would be classed as commercial commodies become parts when, because of their design or construction, they are primarily adapted for use as component parts of such vehicle.

Component parts of articles taxable under this definition are taxable when sold separately if they have reached such stage of manufacture that they are primarily adapted for use as a component part. * * *

Article 16 contains the following provisions:

Definition of accessories.—An "accessory" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

The term "accessories" includes, for example, automobile tops, back and side curtains, horns, speedometers, self-starters, spot lights, shock absorbers, tire pumps, pressure gauges, and hydrometers.

Articles which have a general commercial use and which are not especially designed and peculiarly adapted for use in connection with automobile trucks, automobile wagons, other automobiles, or motor cycles are not subject to tax as "parts" or "accessories." Thus a wrench or other tool of a kind ordinarily sold in hardware stores for general purposes is not subject to tax when sold separately, but if incorporated in an automobile tool kit, designed, intended, advertised, or held out for use on an automobile as distinguished from garage or shop equipment, is taxable as part of the completed kit.

A wrench or other tool of special design or construction primarily adapted for use in connection with automobiles is taxable.

If any doubt exists as to the special adaptability of any article, the fact of its sale by

the manufacturer to be used with an automobile, or to an automobile accessories dealer, would determine its taxability.

Robes, goggles, and lunch kits are not subject to tax. Asbestos brake-band linings, generator tubing, and radiator hose are not subject to tax unless sold in prepared sizes, lengths, shapes, or with such fittings as make them adapted for use only on or in connection with automobiles.

Parts or accessories for automobile trucks, automobile wagons, other automobiles, or motor cycles primarily adapted for use on or in connection therewith when sold for any other purpose are not taxable provided the purchaser files with his order a statement that such parts or accessories are to be used on or in connection with another article of commerce not enumerated or included in subdivisions (1), (2), or (3) of Section 900. * * *

Articles 15, 16, and 17 of Treasury Regulations 47 (revised August, 1924), issued under the 1924 Act, differ in no material respect from those just quoted.

STATEMENT

Petitioner sued in the Court of Claims to recover excise taxes in the sum of $15,616.01, plus interest, assessed against it with respect to gascolators manufactured and sold by it during the period from September 1, 1922, to February 28, 1926. (R. 2, 8.)

In deciding against the petitioner the Court of Claims found the following facts (R. 10–11):

The function of a gascolator is to strain dirt, water, grit, or any foreign matter from gasoline before it reaches the carburetor of an internal-combustion engine. The gascolator is placed between the fuel tank and the carburetor. Gascolators were sold by petitioner to and used during the period October 31, 1922, to March 31, 1926, by airplane, farm implement, automobile, and industrial machinery manufacturers. Said gascolators were adaptable for use on internal-combustion engines which are used to drive tractors, airplanes, industrial machinery, motorboats, marine boats, and automobiles, and were interchangeable on any combustion engine dependent on the size of the fuel pipe and the adapter, which is a device to connect the fuel pipe to the gascolator. The difference in the gascolators sold by petitioner was in the size of the adapter which connects the gascolator to the fuel pipe. The gascolator could be attached to the fuel pipe without the adapter by swedging the fuel pipe to the gascolator.

"It does not appear from the evidence what, if any, part of the taxes sought to be recovered herein were paid for gascolators sold to automobile manufacturers, or for uses other than for automobiles."

ARGUMENT

The burden was on the petitioner to prove in the Court of Claims the facts establishing the invalidity of the taxes sought to be recovered. *United States* v. *Anderson,* 269 U. S. 422, 443. Petitioner admits

that its product "is a useful and desirable accessory for an automobile engine" and that it "advertises and holds it out to the automotive trade as such," but contends that "it is not a necessary accessory and its utility is not limited to automobile engines or motors." (Brief, p. 3.) To be an automobile "accessory" an article need not be "essential" to the operation of an automobile. (See Article 16, Treasury Regulations, p. 5, *supra.*) An article may be an automobile "part" or "accessory" even though it may be possible to utilize it for other purposes. Most automobile parts and accessories could be so utilized. We submit that, to prevail, petitioner must show that its product is used principally or chiefly for other than automobile purposes. Cf. *Magone* v. *Wiederer,* 159 U. S. 555. No finding of the Court of Claims establishes this fact. The Court of Claims has found that "It does not appear from the evidence what, if any, part of the taxes sought to be recovered herein were paid for gascolators sold to automobile manufacturers, or for uses other than for automobiles." (R. 11.) We therefore contend that petitioner has failed to sustain the burden imposed upon it of showing that the taxes which it seeks to recover were imposed on nontaxable articles. See *Botany Worsted Mills* v. *United States,* 278 U. S. 282, 290.

CONCLUSION

While the Government opposes the petition in this case, it is compelled to admit that the findings

in the instant case are as meagre as those in the similar case of *Universal Battery Co.* v. *United States*, No. 127, in which this Court on October 14, 1929, granted a writ of certiorari.

Respectfully submitted.

CHARLES E. HUGHES, JR.,
Solicitor General.
HERMAN J. GALLOWAY,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
RALPH C. WILLIAMSON,
W. MARVIN SMITH,
Attorneys.

OCTOBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

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No. 350

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE BASSICK MANUFACTURING COMPANY,
PETITIONER
v.
THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MOTION OF THE UNITED STATES TO REMAND AND BRIEF IN SUPPORT THEREOF

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 350

THE BASSICK MANUFACTURING COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MOTION OF THE UNITED STATES TO REMAND

Comes now the United States, the respondent herein, by the Solicitor General, and moves the Court to remand the above entitled case to the Court of Claims for additional findings of fact as hereinafter set forth, in the event that this Court is of the opinion that the decision of the Court of Claims should not be affirmed upon the record as presented.

This case raises the question whether petitioner established in the Court of Claims that gascolators manufactured and sold by it during the period from September 1, 1922, to February 28, 1926, and which were adaptable for use on automobile en-

gines and other engines, were not parts or accessories for automobiles sold to any person other than a manufacturer or producer of automobiles within the meaning of Section 900 (3) of the Revenue Act of 1921.

The Court of Claims, in its disposition of the case, made certain findings of fact and concluded that the petitioner was liable for the taxes in question, and thereupon rendered a judgment dismissing the petition. The following are quotations from the findings (R. 10–11):

III

> During the times hereinafter mentioned plaintiff was engaged in the business of manufacturing and selling gascolators (gasoline strainers).
>
> A gascolator is a device designed to be placed between the fuel tank and the carburetor of any internal combustion motor for the purpose of taking out dirt, water, grit, or any foreign matter from the gasoline before it gets to the carburetor, preventing the carburetor from becoming inoperative or not functioning properly. Gascolators were sold by plaintiff to and used, during the period October 31, 1922, to March 31, 1926, by airplane, farm implement, automobile, and industrial machinery manufacturers. Said gascolators were adaptable for use on internal combustion engines, which are used to drive tractors, airplanes, industrial machinery, motor boats, marine boats, and auto-

mobiles, and were interchangeable on any combustion engine dependent on the size of the fuel pipe, and the adapter which is a device to connect the fuel pipe to the gascolator.

IV

During the period October 31, 1922, to March 31, 1926, said gascolators were also sold to companies that only manufactured farm implements and industrial machinery.

The difference in the gascolators sold by plaintiff was in the size of the adapter, which connects the gascolator to the fuel pipe. The gascolator could be attached to the fuel pipe without the adapter by swedging the fuel pipe to the gascolator. Plaintiff issued in November, 1926, a catalogue wherein said gascolator and its various parts are described. Said catalogue advertises a "Ford gascolator," a "Franklin gascolator," and a special "Buick gascolator," and quotes prices therefor. It does not appear from the evidence what, if any, part of the taxes sought to be recovered herein were paid for gascolators sold to automobile manufacturers, or for uses other than for automobiles.

There is no other finding as to the particular purpose for which the petitioner designed its gascolators or as to whom the petitioner sold the gascolators in question. The Government contends that the Court of Claims did not make the following

material findings which were demanded by the record in that court:

(1) The petitioner has not shown that its gascolators on which tax was assessed were not designed especially for use on automobiles.

(2) The petitioner has not shown that its sales were not chiefly to dealers in automobile accessories or that the sales to other classes of dealers were usual or common.

(3) The petitioner has not shown that the great bulk of its sales were not made to persons other than a manufacturer or producer of automobile trucks, automobile wagons, other automobiles, and motor cycles.

Wherefore, it is respectfully prayed that, if this Court is of the opinion, because of incomplete findings or the vagueness of the findings, that the judgment below should not be affirmed, an order be entered remanding said cause to the Court of Claims for findings upon each of the facts hereinbefore set forth, and upon such further and additional facts, if any, as this Court may deem necessary.

Respectfully submitted.

CHARLES E. HUGHES, JR.,
Solicitor General.

JANUARY, 1930.

BRIEF ON MOTION TO REMAND

The evidence in the Court of Claims consists solely of a stipulation as to formal matters and the testimony of an employee of the petitioner. We submit that nothing in the testimony of this witness goes to show that the gascolators upon which the taxes were assessed were not designed and sold chiefly for use as a component part of automobiles.

The witness did testify that they could be used on motors driving tractors, airplanes, and industrial machinery, and power plants, but there was nothing in his testimony negativing the possibility that such uses were infrequent. He did not testify that the bulk of sales were not to dealers in automobile accessories and the like, although in answer to a few specific questions he showed that some sales were made to concerns engaged in manufacturing farm implements and industrial machinery. (R. 12.) The number or volume of such sales was in no way indicated.

As we have pointed out in our brief on the merits, the assessment of the tax by the Commissioner is *prima facie* evidence of its correctness, and the burden is upon the petitioner to prove facts showing that it is invalid. We submit that an examination of the record in the Court of Claims discloses that

the petitioner has failed to sustain this burden; that the findings of the Court of Claims, construed in the light of the testimony, are insufficient to warrant a recovery by the petitioner; and their vagueness should not lead to a reversal of the decision of the Court of Claims.

The Government's motion to remand for additional findings of fact should be granted unless the decision of the Court of Claims is affirmed upon the existing findings of fact.

Respectfully submitted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

CLAUDE R. BRANCH,
Special Assistant to the Attorney General.

RALPH C. WILLIAMSON,
Attorney.

JANUARY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 351

F. W. STEWART MANUFACTURING CORPORATION, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 29, 1929

CERTIORARI GRANTED NOVEMBER 4, 1929

(34,482)

(34,482)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 351

F. W. STEWART MANUFACTURING CORPORATION, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 351

F. W. STEWART MANUFACTURING CORPORATION,
a Corporation,

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MAY IT PLEASE THE COURT: Your petitioner, F. W. Stewart Manufacturing Corporation, by its attorney, respectfully prays for a writ of certiorari to review the judgment of the United States Court of Claims in the above entitled cause.

Statement of the Case

The petitioner corporation is engaged in the manufacture, sale and distribution of repair and replacement parts for speedometers used on automobiles.

Petitioner corporation does not manufacture complete speedometers, but only certain speedometer parts, intended for use in replacing parts of speedometers which have become worn or damaged.

The Treasury Department has held that certain of the speedometer parts manufactured by petitioner corporation are *not* "parts" or "accessories" for automobiles within the meaning of the taxing statutes, and has refunded the taxes illegally collected on sales of the same, but holds that other speedometer parts manufactured by petitioner corporation (and which bear a similar relation to the automobile to those held nontaxable) are "parts" or "accessories" within the meaning of the taxing statutes.

Between the dates October 1, 1921, and October 31, 1925, petitioner corporation was required to pay to the Government on sales of such speedometer parts, taxes in the amount of $4,624.89. Claim for refund of this amount of tax so paid was duly filed by petitioner corporation, and

rejected or disallowed by the Commissioner of Internal Revenue, whereupon suit for recovery of these taxes was filed in the United States Court of Claims.

Subdivision (3) of Section 900 of the Revenue Act of 1921 (42 Stats. 227), and subdivision (3) of Section 600 of the Revenue Act of 1924 (43 Stats. 253), under alleged authority of which the taxes sought to be recovered were levied, assessed, collected and paid, imposed a tax on the manufacturers' sale of "parts *or* accessories" for any of the articles *enumerated in subdivision* (1) *or* (2) of such sections.

The articles enumerated in said subdivisions (1) and (2), as found by the Court of Claims, in its decision in the case of *Martin Rocking Fifth Wheel Co.* v. *The United States* (60 Ct. Cls. 466), are only (1) automobile trucks (2) automobile wagons (3) other automobiles, and (4) motor cycles. Speedometers are not enumerated in subdivision (1) or (2), but are "accessories," enumerated or included in subdivision (3) (See paragraph 2, Article 16, Treasury Department Regulations No. 47, Revised December, 1921), and it is the contention of petitioner corporation that since subdivision (3) of Sections 900 and 600 of the Revenue Acts of 1921 and 1924 imposed a tax on sales of "parts" for only the articles enumerated in subdivisions (1) and (2), and not on sales of parts for articles enumerated in subdivision (3) of those sections, the taxes so paid by it were collected without authority of law.

The case presents for determination by the Court the question of whether speedometer parts manufactured and sold by petitioner corporation are "parts" for articles enumerated in subdivision (1) or (2), within the meaning of subdivision (3) of Sections 900 and 600 of the Revenue Acts of 1921 and 1924.

[fols. 2 & 3] Reasons Relied on for Allowance of the Writ

The writ herein sought should issue for the following reasons:

1. The Court of Claims has decided an important question of Federal taxation which has not been, but should be, settled by this Court.

2. The decision of the Court of Claims is contrary to the principle laid down by that Court in interpreting subdivision (3) of Section 900 of the Revenue Act of 1918 (40 Stats. 1122), which is identical to the provision of the 1921 Act here involved, in the case of *Martin Rocking Fifth Wheel Co.* v. *The United States*, 60 Ct. Cls. 466.

3. The decision of the Court of Claims is inconsistent with the decision rendered by itself, on February 4, 1929, in the case of the *Auburn Rubber Co.* v. *The United States*, interpreting the same provision of the taxing statute here involved, in which decision it was held that patches and reliners for tires enumerated in subdivision (3) were not subject to the tax imposed under that subdivision.

4. The decision of the Court of Claims violates the rule laid down in the cases of *Gould* v. *Gould* (245 U. S. 151) and *United States* v. *Merriam* (263 U. S. 179), heretofore universally followed by the Federal Courts, in that it extends the application of Section 900(3) of the Revenue Act of 1921 and Section 600(3) of the Revenue Act of 1924, so as to bring within their scope articles or things which are not enumerated or included therein.

Wherefore your petitioner respectfully prays that a writ of certiorari to review the judgment of the Court of Claims herein may be granted.

George M. Wilmeth, Attorney for Petitioner, Transportation Building, Washington, D. C.

[fol. 1] IN THE COURT OF CLAIMS

No. F-318

F. W. STEWART MANUFACTURING CORPORATION, a Corporation, Claimant,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed October 13, 1926

To the Honorable the Court of Claims:

The claimant, F. W. Stewart Manufacturing Corporation, respectfully represents to the Court:

I. That it is, and at all times mentioned herein has been, a corporation organized, existing and doing business under

and by virtue of the laws of the State of Illinois, with its office and principal place of business located at Chicago, in that State.

II. That claimant is the manufacturer and distributor of parts for automobile speedometers, among which are speedometer gears, drive chains, or flexible shafts, and flexible housings therefor. It does not manufacture or sell complete speedometers; the articles manufactured and sold by claimant, as herein enumerated, are designed and intended to be used, and are used, as replacement parts for such speedometers.

III. That Section 900 of the Revenue Act of 1918 (40 Stats. 1122) provided:

[fol. 2] That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased——

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum; * * *

Pursuant to the provisions of said Act, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on or about December 27, 1920, promulgated certain regulations, known as "Regulations No. 47 (Revised)," relating to the Excise Taxes on Sales by the Manufacturer under Section 900 of the Revenue Act of 1918, which said regulations provided, in part, as follows:

Art. 15. Definition of Parts.—A "part" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use and which is primarily adapted only for use as a component part of such vehicle.

* * * * * * *

[fol. 3] Art. 16. Definition of Accessories.—An "accessory" for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation. * * *

IV. Section 900 of the Revenue Act of 1921 (42 Stats. 227) reenacted or continued in force, effective from January 1, 1922, the taxes imposed by Section 900 of the Revenue Act of 1918, supra. And a revised edition of Regulations No. 47 issued by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury on or about January 6, 1922, continued in force, without change, the provisions of Articles 15 and 16 above quoted.

V. Section 600 of the Revenue Act of 1924 (43) Stats. 253, 322), approved June 2, 1924, provided:

On and after the expiration of thirty days after the enactment of this Act there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

(1) Automobile truck chassis and automobile wagon chassis sold or leased for an amount in excess of $1,000, and automobile truck bodies and automobile wagon bodies sold or leased for an amount in excess of $200 (including in both cases, tires, inner tubes, parts, and accessories there-

for sold on or in connection therewith or with the sale thereof), 3 per centum. A sale or lease of an automobile truck or of an automobile wagon shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body;

[fol. 4] (2) Other automobile chassis and bodies and motor cycles (including tires, inner tubes, parts, and accessories therefor sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum. A sale or lease of an automobile shall, for the purposes of this subdivision, be considered to be a sale of the chassis and of the body;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 2½ per centum. This subdivision shall not apply to chasses or bodies for automobiles, trucks, automobile wagons, or other automobiles; * * *

And pursuant to the provisions of said Act, on or about August 29, 1924, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated or issued a revised edition of said "Regulations No. 47 (Revised)" in which it was provided, inter alia, as follows:

Art. 16. Parts or Accessories—Definition of Parts.—A "part" for an automobile truck, automobile wagon, or other automobile chassis or body, or motor cycle, is any article designed or manufactured for the special purpose of being used as, or to improve, repair, or replace, a component part of any such vehicle or article, and which by reason of some peculiar characteristic is not such a commercial commodity as would ordinarily be sold for general use, or which is primarily adapted only for use as a component part of such vehicle or article.

Definition of Accessories.—An "accessory" for an automobile truck, automobile wagon, or other automobile chassis or body, or motor cycle, is any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article

[fol. 5] which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use. * * *

VI. Between the dates of October 1, 1921, and October 31, 1925, there were levied, assessed against, and collected from claimant, and paid by the claimant to the United States Collector of Internal Revenue at Chicago, Illinois, taxes in the amount of $4,624.89 on sales by claimant of speedometer gears, speedometer drive chains or flexible shafts, and flexible housings for such drive chains or shafts, as described in paragraph II of this petition. Said taxes, all which were purported to have been levied, assessed, and collected under the provisions of subdivisions (3) of Sections 900 of the Revenue Acts of 1918 and 1921 and subdivision (3) of Section 600 of the Revenue Act of 1924, were levied, assessed, and collected on sales of articles and for periods as follows:

Shaft and Housing Sales

Year	Tax
1921 (October, November, December)	$125.42
1922	1,168.30
1923	1,007.31
1924	775.70
1925	607.91
Total	$3,684.64

[fol. 6]

Gear Sales

1921 (October, November, December)	$36.72
1922	292.09
1923	280.62
1924	216.63
1925	114.19
Total	$940.25

VII. On or about November 27, 1925, claimant filed with the Commissioner of Internal Revenue a claim for refund of said sum of $4,624.89 for reasons set forth therein as follows:

The above amount as paid as excise tax on our sales of parts of accessories (speedometer gears, drive chains and flexible housings, etc.). We do not manufacture complete speedometers, but only replacement parts therefor.

Subdivision (3) of Sections 900 of the Revenue Acts of 1918 and 1921, and subdivision (3) of Section 600 of the Revenue Act of 1924, imposed a tax upon the manufacturer's sale of "Tires, inner tubes, parts or accessories for articles enumerated in subdivision- (1) and (2)" of those Sections. The articles enumerated in subdivisions (1) and (2) are "automobile trucks," automobile wagons," "other automobiles" and "motor cycles." Accessories are not enumerated in subdivisions (1) and (2), but only parenthetically included therein for the purpose of fixing the tax rate thereon, when sold with or as a part of an article enumerated in (1) or (2). It is clear, therefore, that parts of accessories sold by us were not taxable under the law, and we accordingly demand that the amount paid thereon be refunded. * * *

In a letter from the Commissioner of Internal Revenue dated March 4, 1926, claimant was advised of the rejection of said claim as follows:

[fol. 7] Reference is made to your claim for refund of $4,624.89, representing manufacturers excise tax for the period October, 1921, to October, 1925, inclusive.

Your claim is based upon the contention that the Revenue Acts of 1918, 1921, and 1924, did not contemplate the taxing of such articles as flexible shaftings, flexible housings and fiber gears which are merely parts of speedometer assemblies. You state that you did not manufacture complete speedometers but merely manufacture replacement parts which you believe are not subject to tax and you therefore request refund of tax paid by you on sales of such articles.

You are advised that the Bureau has consistently held that such articles as flexible housings and shafts and fiber gears are properly subject to tax under the various Revenue Acts, which decision was not reached until after the question of the taxability of these articles had been very carefully considered.

No evidence has been presented by you which would tend to alter the opinion of the Bureau with respect to these articles and your claim is accordingly rejected.

Subsequently claimant requested that its said claim be reopened and reconsidered for the reason that the letter of rejection above quoted did not take into consideration the contentions raised by claimant in its claim for fund. In a letter dated April 24, 1926, claimant was advised by Deputy Commissioner R. M. Estes as follows:

Reference is made to your claim for refund in the amount of $4,624.89 which was rejected under date of March 4, 1926, covering tax paid on sales of flexible shaftings, flexible housings, fiber gears, etc., during the period October, 1921, to October, 1925, inclusive. You now request that this claim [fol. 8] be reopened and reconsidered on the ground that these articles are parts of accessories and therefore not subject to tax under subdivision (3) of sections 900 of the Revenue Acts of 1918 and 1921 and subdivision (3), section 600 of the Revenue Act of 1924.

You are advised the contentions raised by you have been considered by this office in many other cases as well as connection with your claim and the statements on which you base your request for reopening of your claim do not appear to present any new evidence and are not considered sufficient to warrant a change in the established rulings of the office of the reopening of the claim.

VIII. Claimant is advised by counsel, and therefore avers, that the taxes collected from it on the sale of replacement parts for speedometers, as aforesaid, are illegal and erroneous and were illegally and erroneously assessed and collected by the United States of America through said Collector of Internal Revenue at Chicago, Illinois, without warrant or authority of law, for the following reasons:

Subdivisions (3) of sections 900 of the Revenue Acts of 1918 and 1921, and subdivisions (3) of section 600 of the Revenue Act of 1924, under the provisions of which the taxes the recovery of which is herein claimed were assessed and collected, imposed a tax only on the sales of "* * * parts or accessories" for articles enumerated in subdivisions (1) and (2) of said sections.

A speedometer is an accessory for an automobile, or, in other words, it is one of the articles enumerated in subdivision (3) of sections 900 of the Revenue Acts of 1918 and 1921 and subdivision (3) of section 600 of the Revenue Act of 1924.

[fols. 9 & 10] Neither of the Revenue Acts above cited contains any provision authorizing the imposition of any tax on the sale or lease of "parts" for any of the articles enumerated in subdivision (3) of sections 900 of the Revenue Acts of 1918 and 1921 and subdivision (3) of section 600 of the Revenue Act of 1924.

Wherefore claimant claims from the United States the sum of $4,624.89, with interest at the rate of six (6) per centum per annum, as provded by law.

IX. No action upon this claim other than herein stated has been had before Congress or any other of the departments of the Government. Claimant is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States and has not at any time in any way aided, abetted or given encouragement to rebellion against said Government; it is the sole owner of the claim herein stated, and no part of said claim has ever been sold, assigned or discharged, and it is justly entitled to the amount herein claimed from the United States after allowing all just credits and off-sets.

F. W. Stewart Manufacturing Corporation, Claimant, by George M. Wilmeth, Attorney for Claimant, Transportation Building, Washington, D. C.

Duly sworn to by George M. Wilmeth. Jurat omitted in printing.

[fol. 11] II. General Traverse—Filed December 11, 1926

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission

On February 4, 1929, this case was argued and submitted on merits by Mr. George M. Wilmeth, for the plaintiff, and by Mr. Ralph C. Williamson, for defendant.

[fol. 12]

IV. Special Findings of Fact, Conclusion of Law, and Memorandum by the Court—Filed March 11, 1929

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

I

The plaintiff is, and at all times mentioned herein has been, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at Chicago, in that State.

II

Plaintiff was, during the period in question, engaged in the manufacture and sale of parts for automobile speedometers, particularly speedometer gears, drive chains, or flexible shafts, and flexible housings for such shafts. Plaintiff did not manufacture or sell complete speedometers but only the parts heretofore enumerated. Said articles were especially designed, manufactured, and sold for use on or in connection with automobiles and are not adapted to any other purpose or use. The excise taxes in question were paid with respect to said articles.

III

Between October 1, 1921, and October 31, 1925, there were levied and assessed against, and collected from plaintiff, and paid by it through the United States Collector of Internal Revenue at Chicago, Illinois, on sales of speedometer gears, drive chains or flexible shafts, and flexible housings for such chains or shafts, as hereinbefore described, taxes in the amount of $4,624.89. Subsequently claim for refund was filed with the Commissioner of Internal Revenue, which claim was rejected.

[fol. 13] IV

Flexible drive chains, or shafts and housings, are used on other machines than automobiles, but those taxed in this case are specially manufactured and designed for use on speedometers which are used on automobiles.

V

Plaintiff is a citizen of the United States, and it and its officers and directors have always borne true allegiance to the Government of the United States, and have never voluntarily aided, abetted, or given encouragement to rebellion against said Government. No part of the claim sued for has ever been sold, assigned, or satisfied.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and its petition should be dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Memorandum

The only question in this case is whether speedometer gears, drive chains, or flexible shafts, and flexible housings for such shafts, especially designed, manufactured, and sold for use on automobiles, and which were adapted for no other purpose or use, subjected plaintiff to liability for the payment of excise taxes under the provisions of section 900 of the revenue act of 1921, 42 Stat. 291, and section 600 of the revenue act of 1924, 43 Stat. 322, which levy taxes on parts and accessories sold on or in connection with automobiles, automobile trucks, and automobile wagons.

We think the articles in question were clearly subject to the tax. It is a matter of common knowledge that no automobile is now made and sold in this country without a speedometer, and that owing to the speed regulations which

universally prevail it would be difficult to operate an automobile without this device. In fact an automobile would not be complete without a speedometer.

The Martin Rocking Fifth Wheel Co. v. United States, 60 C. Cls. 466, is not an authority to the contrary. In that case the article sought to be taxed was not a part of the automobile, but merely a device used in connecting a trailer therewith. In fact, it in no way affected the operation of the automobile itself. The case is controlled by the decisions in Cole Storage Battery Co. v. United States, 65 C. Cls. 164, and Walker Mfg. Co. v. United States, 65 C. Cls. 394.

It follows that plaintff's petition must be dismissed. It is so ordered.

[fol. 14] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 11th day of March, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him according to law, which amount is found to be $32.34.

VI. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On May 10, 1929, the plaintiff filed a motion for a new trial.

On June 3, 1929, the court entered the following order on said motion:

Order

It is ordered this 3rd day of June, 1929, that the plaintiff's motion for new trial be and the same is overruled.

[fol. 15] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,482. Court of Claims. Term No. 351. F. W. Stewart Manufacturing Corporation, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed August 29, 1929. File No. 34,482.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 4, 1929

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is assigned for argument with cases Nos. 127 and 275 as one case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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F I L E
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CHARLES ELMOR

IN THE

Supreme Court of the United States.

October Term, 1929.

No. 351.

F. W. STEWART MANUFACTURING CORPORATION, *Petitioner*,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

GEORGE M. WILMETH,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States.

October Term, 1929.

No. 351.

F. W. STEWART MANUFACTURING CORPORATION, *Petitioner*,

v.

THE UNITED STATES.

OPINION OF THE COURT BELOW.

The opinion of the Court of Claims (R. 12–13) was announced on March 11, 1929, but has not yet been reported.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

The petitioner corporation is engaged in the manufacture, sale and distribution of repair and replacement parts for speedometers used on automobiles.

Petitioner corporation does not manufacture complete speedometers, but only certain speedometer parts, intended for use in replacing parts of speedometers which have become worn or damaged.

The Treasury Department has held that certain of the speedometer parts manufactured by petitioner corporation are *not* "parts" or "accessories" for automobiles within the meaning of the taxing statutes, and has refunded the taxes illegally collected on sales of the same, but holds that other speedometer parts manufactured by petitioner corporation

(and which bear a similar relation to the automobile to those held nontaxable) are "parts" or "accessories" within the meaning of the taxing statutes.

Between the dates October 1, 1921, and October 31, 1925, petitioner corporation was required to pay to the Government on sales of such speedometer parts, taxes in the amount of $4,624.89. Claim for refund of this amount of tax so paid was duly filed by petitioner corporation, and rejected or disallowed by the Commissioner of Internal Revenue, whereupon suit for recovery of these taxes was filed in the United States Court of Claims.

Subdivision (3) of Section 900 of the Revenue Act of 1918 (40 Stats. 1122), subdivision (3) of Section 900 of the Revenue Act of 1921 (42 Stats. 227), and subdivision (3) of Section 600 of the Revenue Act of 1924 (43 Stats. 253), under alleged authority of which the taxes sought to be recovered were levied, assessed, collected and paid, imposed a tax on the manufacturers' sale of "parts *or* accessories for any of the articles *enumerated in subdivision (1) or* (2)" of such sections.

The articles enumerated in said subdivisions (1) and (2), as found by the Court of Claims in its decision in the case of *Martin Rocking Fifth Wheel Co.* v. *United States* (60 C. Cls. 466), are only (1) automobile trucks, (2) automobile wagons, (3) other automobiles, and (4) motor cycles. Speedometers are not enumerated in subdivision (1) or (2), but are "accessories," enumerated or included in subdivision (3) (see paragraph 2, Article 16, Treasury Department Regulations No. 47, Revised December, 1921), and it is the contention of petitioner corporation that since Sections 900 and 600 of the Revenue Acts of 1918, 1921 and 1924 imposed a tax on sales of parts for only the articles enumerated in subdivisions (1) and (2), and not on sales of parts for articles enumerated in subdivision (3) of those sections, the taxes so paid by it were collected without authority of law.

QUESTION TO BE DECIDED.

The case presents for determination by the Court the question of whether speedometer parts manufactured and sold

by petitioner corporation are "parts" for articles enumerated in subdivision (1) or (2), within the meaning of subdivision (3) of Sections 900 and 600 of the Revenue Acts of 1918, 1921 and 1924.

STATUTES AND DEPARTMENTAL REGULATIONS INVOLVED.

The provisions of Section 900 of the Revenue Act of 1918 (40 Stats. 1122), Section 900 of the Revenue Act of 1921 (42 Stats. 227), and Section 600 of the Revenue Act of 1924 (43 Stats. 253, 322), under alleged authority of which the taxes involved were levied, assessed, collected and paid; and the pertinent provisions of the Departmental Regulations (No. 47) relating thereto, are quoted at pages 4, 5, 6 and 7 of the record herein.

ASSIGNMENTS OF ERROR.

I.

The question decided by the Court of Claims is an important one involving interpretation of a Federal taxing statute which has not been, but should be, definitely settled by this Court, in justice to many manufacturers of parts for accessories on sales of whose products taxes have been levied without authority of law.

II.

The decision of the Court of Claims is contrary to the principle laid down by that Court in interpreting subdivision (3) of Section 900 of the Revenue Act of 1918 (40 Stats. 1122), the identical provision of law here involved, in the case of *Martin Rocking Fifth Wheel Co.* v. *United States*, 60 C. Cls. 406.

III.

The decision of the Court of Claims is inconsistent with the decision rendered by that Court, on February 4, 1929, in the case of the *Auburn Rubber Co.* v. *The United States* (No.

H–433), interpreting the same provision of the taxing statute here involved, in which decision it was held that patches and reliners for tires enumerated in subdivision (3) were not subject to the tax imposed under that subdivision.

IV.

The decision of the Court of Claims violates the rule laid down in the cases of *Gould* v. *Gould* (245 U. S. 151) and *United States* v. *Merriam* (263 U. S. 179), heretofore universally followed by the Federal Courts, in that it extends the application of subdivision (3) so as to bring within its scope articles or things which are not enumerated or included therein.

ARGUMENT.

The decision of the Court of Claims states:

> "The only question in this case is whether speedometer gears, drive chains, or flexible shafts, and flexible housings for such shafts, especially designed, manufactured, and sold for use on automobiles, and which were adapted for no other purpose or use, subjected plaintiff to liability for the payment of excise taxes under the provisions of Section 900 of the Revenue Act of 1921, 42 Stat. 291, and section 600 of the Revenue Act of 1924, 43 Stat. 322, which levy taxes on parts and accessories sold on or in connection with automobiles, automobile trucks, and automobile wagons."

It is respectfully submitted that the above is not an accurate statement of the question involved in the case, first, because the "parts" were not designed for use on *automobiles*, but for use on *automobile speedometers*, and second, because the taxes involved were not paid on such parts "*sold on or in connection with automobiles, automobile trucks, and automobile wagons*," but on separate sales of the various parts enumerated, for replacement of worn and broken parts of *automobile speedometers*.

It is obvious from the above quoted language used in stating the question involved, that the Court failed to understand

petitioner's contention as to why the products manufactured by it were not properly taxable under the statutes. It is true, as stated by the Court, in substance, that subdivisions (1) and (2) levied taxes on sales of complete automobile trucks, automobile wagons, other automobiles and motor cycles "(including tires, inner tubes, parts, and accessories therefor, sold thereon or in connection therewith or with the sale thereof)," but the taxes sought to be recovered were not levied under subdivision (1) or (2). The taxes involved were levied under alleged authority of subdivision (3). This subdivision imposed no tax on automobiles, trucks, or motor cycles, and neither did it impose a tax on parts or accessories *sold on or in connection with such vehicles*. The tax under subdivision (3) was on tires, inner tubes, parts, or accessories for the vehicles enumerated in subdivisions (1) and (2), when such tires, inner tubes, parts, or accessories were sold by the manufacturers thereof, "to any person other than a manufacturer or producer of any of the articles (vehicles) enumerated in subdivision (1) or (2)," separate and apart from the complete vehicles. The ground on which petitioner's claim is based is that subdivision (3) imposed no tax on "parts for articles enumerated in that subdivision, but only on "parts" for articles enumerated in subdivisions (1) and (2).

The Court further states in its decision:

> "* * * It is a matter of common knowledge that no automobile is now made and sold in this country without a speedometer, and that owing to the speed regulations which universally prevail it would be difficult to operate an automobile without this device. In fact an automobile would not be complete without a speedometer."

While it is true that all automobiles are now equipped with speedometers, and that they are installed as a permanent part of the equipment, they are not "parts" of the automobile, and are not manufactured by the automobile manufacturer. They are "accessories," made by a different company and sold by it to the automobile manufacturer. Treasury Department Regu-

lations No. 47, covering the operation of sections 900 and 600, reads, in part, as follows:

> "Art. 16. * * *
> The term 'accessories' includes, for example, * * * horns, *speedometers*, self starters, spot lights, shock absorbers, * * *."

An automobile may be operated just as efficiently without a speedometer, and the fact that an automobile manufacturer equips his car with a speedometer, and that it is undoubtedly a welcome convenience to the operator of the car, for registering speed and mileage, does not change the character of the speedometer from an "accessory" to a "part," any more than the fact that practically all automobiles are now sold by the manufacturers equipped with windshield wipers, bumpers, shock absorbers, stop light, parking light, jack, etc., changes the character of these "accessories" to "parts." As stated by the Court of Claims in the case of *Atwater Kent Mfg. Co.* v. *United States* (62 C. Cls. 419), "The question is not whether they were 'parts' of *something* after they were attached to the one or another kind of machine to which they were attached, and in which they could function, but whether they were *sold as parts of the articles mentioned in subdivisions (1) or (2)* of Section 900." (Italics supplied.)

The reference, in its decision, to the case of *Martin Rocking Fifth Wheel Co.* v. *United States* (60 C. Cls. 466), also indicates that the Court failed to comprehend petitioner's contention. In citing this decision, petitioner did not contend that there was any similarity between the products sold by it, and the product involved in the *Martin* case. In that decision, the Court, interpreting the same provision of the taxing statute here involved, stated:

> "'Parts,' as used in that paragraph, are 'parts' *for* [italics ours] the articles enumerated in paragraphs (1) and (2), which are 'automobile trucks,' 'automobile wagons,' 'other automobiles,' and 'motor cycles,' 'except tractors.'"

It is petitioner's contention that subdivision (3) imposed no tax on parts for articles enumerated in that subdivision, but only on parts for articles enumerated in subdivisions (1) and (2), which are the complete vehicles specified therein; and the language used by the Court in the Martin decision was cited in support of this contention, as showing that the Court had already adopted this interpretation, but it is apparent that the Court missed the application, and misunderstood the citation as a contention of similarity of character between the products involved in the two cases.

The sole question involved in the present case is whether subdivision (3) imposed a tax on sales of parts for articles enumerated in that subdivision.

In the cases of *Cole Storage Battery Co.* v. *United States*, 65 C. Cls. 164, and *Walker Mfg. Co.* v. *United States*, 65 C. Cls. 394, cited by the Court as controlling the present case, the question involved was not the taxability of parts for batteries or parts for jacks. As a matter of fact the Treasury Department had held that parts of storage batteries and parts of lifting jacks *were not subject to tax* under subdivision (3) as "parts for articles enumerated in subdivision (1) or (2)." (S. T. 367, C. B. 6–1922, p. 443.) The question presented for determination by the Court in these two cases was whether complete storage batteries and complete lifting jacks were "parts or accessories for automobiles," as distinguished from commercial commodities adaptable for general use, and the Court properly held that they were such "parts or accessories" within the meaning of the taxing Acts.

Subdivisions (1) and (2) of Section 900 of the Revenue Act of 1918 (and the corresponding provisions of the other Acts here involved) imposed certain taxes upon the manufacturers' selling price of complete automobile trucks, automobile wagons, other automobiles and motor cycles, and, realizing that *replacements* on automobiles became necessary from time to time, and that such *replacements* could properly bear a like burden, Congress imposed under subdivision (3) a tax on the manufacturers' selling price of "tires, inner tubes, *parts, or accessories for any of the articles enumerated in subdivision (1) or*

(3)." It is submitted that this definite mention of articles *enumerated in subdivision* (1) or (2) was intended for the purpose of levying a tax on the sale, *for replacement purposes*, of complete "tires," "inner tubes," "accessories" and "parts" for the articles enumerated in subdivisions (1) and (2), when such complete units enumerated in subdivision (3) were needed as replacements, and was not intended to tax parts or materials sold for use in repairing or reconditioning, and thus prolonging the life of, articles enumerated in subdivision (3). (*National Rubber Filler Co.* v. *United States*, 63 C. Cls. 337).

If Congress had desired to tax parts for articles enumerated in subdivision (3), it would have been a simple matter to definitely accomplish this purpose by inserting after the words "subdivision (1) or (2)," the words "or in this subdivision," but this was not done, and petitioner submits that the language used did not impose a tax upon parts for articles enumerated in subdivision (3).

The Treasury Department, as a general rule, has adopted this interpretation, as indicated by its ruling on plate glass. (O. D. 133, S. T. 621–257.) In this ruling it was held that "plate glass cut to size and shape for use in automobile windshields is not subject to tax unless sold mounted in new frames." This shows that the Bureau interpreted the law as intending not to tax the repair of an old, broken windshield, by the installation of new glass, but only the sale of a complete new windshield including the glass and frame. The same principle was laid down in the Departmental ruling on top recovering. S. T. 392, I–39–525 held that the recovering of old automobile top bows was not subject to tax, but that the sale of a complete new top, including top bows and bow sockets, was taxable. This interpretation of the statute was also followed in the ruling on radiators. A complete radiator, consisting of the core and upper and lower tanks, soldered together, was held taxable as a "part," but S. T. 448, III–19–1552 held that radiator cores and upper and lower tanks, sold separately, were not subject to the tax imposed by subdivision (3).

Among other articles which have been held nontaxable in accordance with this interpretation of the statute may be

mentioned the following: Parts of generators, parts of starters, parts of magnetos, cross chains for anti-skid chains, top decks, side quarters, back curtains, plate glass cut to size and shape for doors and windows, chains cut to length, retread bands for tires, reliners for tires, parts of distributors, spokes, felloes and hub flanges for wheels, etc. (See list of articles held non-taxable, pages 123–4, Record of Hearing before the Subcommittee of the House Committee on Appropriations on First Deficiency Appropriation Bill, 1927, 69th Congress, Second Session; also O. D. 100, S. T. 4–21–215; S. T. 394, C. B. December, 1922, p. 295, and Par. 2012–32, C. C. H. Tax Service, 1927.)

The question involved in the cases held by the Court of Claims to be controlling is entirely different from the one involved in the present case. Petitioner makes no contention that complete speedometers were not taxable under the provisions of subdivision (3) of Section 900 of the Revenue Acts of 1918 and 1921, and subdivision (3) of Section 600 of the Revenue Act of 1924.

SUBDIVISION (3) IMPOSED NO TAX UPON PARTS FOR ARTICLES ENUMERATED IN SUBDIVISION (3) BUT ONLY UPON PARTS FOR ARTICLES ENUMERATED IN SUBDIVISIONS (1) AND (2).

The sole question presented, then, is what are the articles enumerated in subdivisions (1) and (2)?

Consideration of the provisions of the statute, and the purpose of the language used, must necessarily lead to the conclusion that, for the purposes of subdivision (3), the only articles *enumerated* in said subdivisions (1) and (2) are the *complete vehicles* specified therein.

The first clause or paragraph of Section 900 provides for a tax on sales made by only the *manufacturer*, *producer* or *importer*. Subdivision (1) specifies the rate of tax to be paid by such manufacturers, producers and importers, on sales of complete automobile trucks and automobile wagons. Subdivision (2) specifies the rate of tax to be paid on sales of all

other complete automobiles and motor cycles. These taxes were payable only on sales made by the manufacturer, producer or importer, and no tax was imposed on the resale by the distributor or dealer.

After providing for a tax on the sale of the complete vehicles enumerated in subdivisions (1) and (2), Congress further provided, in subdivision (3), for a tax on tires, inner tubes, replacement parts and accessories, when sold by the manufacturer, producer or importer thereof "*to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2)*" (i. e. complete automobile trucks, automobile wagons, other automobiles and motor cycles). By making the tax under this subdivision applicable only to *sales to persons other than manufacturers* liable for the taxes imposed under subdivisions (1) and (2), specific exemption was provided for sales made *to such manufacturers*. The clear intent and purpose of this exemption of sales to such manufacturers and producers is to avoid a double tax on any portion of the complete vehicles which are specifically taxed as such under subdivisions (1) and (2).

The reason for providing this exemption of sales of parts and accessories to manufacturers of the complete vehicles, as well as the reason for the use of the word "producer," was the well-recognised fact that many automobiles were an entirely assembled product, and that the "producers" thereof actually manufactured nothing. The bodies, engines, radiators, axles, wheels, rims, tires, springs, fenders, etc., from which the complete cars were assembled by such producers were all made by different manufacturers of the respective articles, and the purpose of the Act was to levy a tax on the producer's sale of the complete vehicle, and then, if replacement of any of the component parts, or of the accessories, became necessary, to levy a tax on the sale of such *replacements* or extra equipment, by the manufacturers thereof. The fact that the word "importer" was omitted from subdivision (3) is significant on this point, as showing that there was no intent to exempt sales of parts or accessories when made to the importer of cars completely manufactured in a foreign country.

After providing exemption for articles enumerated in sub-

division (3), when sold to manufacturers or producers of complete vehicles, because of the fact that the tax levied by Section 900 applied to sales made only by the *actual manufacturer, producer* or *importer*, it was necessary, in order to insure collection of tax on any parts or accessories purchased by the producer of the complete car under this exemption, and sold as extra equipment (rather than as component parts of the complete vehicle) to make the terms "automobile trucks," "automobile wagons," "other automobiles" and "motor cycles" inclusive of this extra equipment, and this was done by inserting, parenthetically, in subdivisions (1) and (2), the words "(including tires, inner tubes, parts, and accessories therefor, *sold thereon or in connection therewith or with the sale thereof*)."

Since the situation with regard to the manufacture or production of tires, inner tubes, parts, and accessories is entirely different from that existing with respect to the production of complete automobiles, there was no reason to provide for exemption of sales of "parts" for the articles enumerated in subdivision (3), to manufacturers or producers. The articles enumerated in subdivision (3) are not, as a general rule, produced by the assembling of "parts" for the same purchased from various manufacturers. Each tire, inner tube, part, or accessory, is wholly manufactured and sold in the finished state by the manufacturer thereof, and there could be no danger of a double tax having been paid on any portion of the same when sold by him.

It must follow, therefore, that if manufacturers of tires, inner tubes, parts, or accessories purchased no "parts" for use in the manufacture of their products, there could be no danger of a double tax being paid on their sales of such products, and that, consequently, *there was no necessity for providing exemption for sales of parts for the same;* and that the word "parts" used in subdivision (3) must, accordingly, mean *only parts for the complete vehicles enumerated in subdivisions (1) and (2)*, and not parts for any of the extra equipment parenthetically mentioned in these subdivisions.

If it is held that the term "any of the articles enumerated

in subdivision (1) or (2)" means not only the complete vehicles specified, but also the articles parenthetically mentioned, then it must necessarily be held, also, that any manufacturer of tires, inner tubes, parts, or accessories was entitled to exemption on all sales of his product made to any other manufacturer of tires, inner tubes, parts, or accessories. Such a construction of the statute would open the door for serious evasions of tax. Under such a construction, a manufacturer of tires, for instance, would be legally entitled to sell his entire product, *tax free*, to a manufacturer of bumpers, and since the tax is collectible only from the *actual* manufacturer or producer, and since there is no provision in subdivision (3) requiring a manufacturer of bumpers to pay tax on sales of his product (including tires, inner tubes, parts, or accessories sold in connection with the sale thereof), such manufacturer of bumpers could resell the tires purchased by him from the tire manufacturer under the statutory exemption, without incurring liability under the statute for any tax other than that due on sales of products actually manufactured by him.

Speedometers are not *enumerated* in subdivision (1) or (2), and neither are they "parts" for articles enumerated in those subdivisions. They are "accessories" enumerated or included in subdivision (3), and are so defined in the Departmental Regulations. As hereinbefore stated, petitioner makes no contention that a complete speedometer assembly was not properly taxable under subdivision (3), when so sold; and under subdivision (1) or (2), as the case might be, when sold "on or in connection with" a complete automobile truck, automobile wagon, other automobile, or motor cycle. The tax involved in this suit, however, was not levied on complete speedometers, sold separately, or otherwise, but on sales of *replacement parts for speedometers*. Petitioner manufactured no complete speedometers, but only certain replacement parts for the same, and while it is admitted that these parts were especially designed and intended for use as replacements on automobile speedometers, petitioner submits that since they were not "parts for articles enumerated in subdivision (1) or (2)," but parts for an "accessory" enumerated in subdivision (3), they were not taxable under the statutes.

The parenthetical mention of tires, inner tubes, parts, and accessories in subdivisions (1) and (2) manifestly was intended for the sole purpose of fixing the rate of tax which should be paid on such parts and accessories when sold as a part of or as extra equipment in connection with the sale of the vehicles enumerated in those subdivisions, namely, automobile trucks, automobile wagons, other automobiles and motor cycles. If such parts or accessories were sold with either of the two first named vehicles, the rate of tax was 3 per centum; while if sold with either of the two last named vehicles, the rate was 5 per centum. That, it is submitted, was the plain intent and sole purpose of the Congress. Certainly the parenthetical mention in subdivisions (1) and (2) of tires, inner tubes, parts, and accessories did not mean and was not intended as an "enumeration" of these articles, for the purposes of subdivision (3).

To say that the parenthetical mention of parts and accessories in subdivision (2) constitutes an enumeration thereof for the purposes of subdivision (3) is just exactly as reasonable as to say that the mention of the word "tractors" in the same subdivision constitutes an enumeration of such vehicles for the purposes of subdivision (3), and that consequently, parts and accessories for tractors were taxed by subdivision (3), even though tractors were specifically exempted from the tax imposed by subdivision (2). Petitioner does not believe that this Court would subscribe to such a construction of the statutes here involved, but such would be the result or effect of consistent application of the Department's holding that subdivision (3) of Sections 900 of the Revenue Acts of 1918 and 1921, and subdivision (3) of Section 600 of the Revenue Act of 1924, imposed a tax on parts for articles parenthetically included or in any way mentioned in subdivisions (1) and (2) of those sections.

Treasury Department Regulations No. 47, Article 15 (R. 5) defines a "part" *for the vehicles enumerated* as "any article designed for the special purpose of being used *as or to replace a component part* of any such vehicle * * *." Article 16 (R. 5) defines an "accessory" for the vehicles enumerated as "any

article designed *to be attached to or used in connection with* such vehicle * * *." The same article of the Regulations also specifically mentions speedometers among examples of "accessories." These definitions in the Departmental Regulations show not only that the Department made a clear distinction between "parts" and "accessories," but also that it was defining "parts" for the *vehicles* and "accessories" for the *vehicles*, and not parts or accessories for any of the other articles mentioned in subdivisions (1) and (2).

The Court of Claims held, in the case of the *Auburn Rubber Co.* v. *The United States* (H–433), decided February 4, 1929, that blow-out patches and reliners for tires were not taxable as parts or accessories for articles enumerated in subdivision (1) or (2). Obviously, the only theory on which this decision can be based is that the products involved are not accessories for articles enumerated in subdivision (1) or (2), *but are accessories for tires, enumerated in subdivision* (3). Petitioner submits that if "accessories" for articles enumerated in subdivision (3) are not subject to the tax imposed by that subdivision, then it necessarily follows that "parts" for articles enumerated in subdivision (3) are nontaxable for the same reason.

The decision of the Court of Claims states that an automobile would not be complete without a speedometer. It is submitted that even if this were literally true, it would not materially affect petitioner's contention. Exactly the same thing may be said of horns, stop lights, tires, inner tubes, etc. An automobile not only would not be complete without tires and inner tubes, but it could not be operated without them. Notwithstanding this, however, the fact remains that they are articles enumerated in subdivision (3), and, as stated by the Court in the *Atwater Kent Mfg. Co.* case, *supra*, the test is not what they become after being attached to something else, but what they are at the time of sale by the manufacturer. All of these articles are unquestionably designed for the purpose of being attached to automobiles, but at the time of sale by the manufacturers thereof, they are articles enumerated in subdivision (3), and the statutes imposed no tax on parts or

accessories for articles enumerated in that subdivision. (*Auburn Rubber Co.* v. *United States* and *National Rubber Filler Co.* v. *United States, supra.*)

In the case of the *National Rubber Filler Co.* v. *The United States*, 63 C. Cls. 337, the product involved was neither a part nor an accessory for any of the vehicles enumerated in subdivision (1) or (2). It was an accessory for a tire, enumerated in subdivision (3), and the Court of Claims held that it was not within the power of the Commissioner of Internal Revenue to extend the provisions of the taxing statute so as to bring such a product within its scope. In discussing the question of whether the words "parts" and "accessories" used in the taxing statutes could be properly construed to include the rubber filler involved, the Court said:

> "Beyond doubt the articles enumerated specifically in subdivision (3) of Section 900 have no common meaning. Otherwise it would have been unnecessary to specify. In similar revenue legislation the same course has been pursued by Congress, and articles subjected to taxation carefully enumerated specifically. Reference to an article by its fixed trade name was obviously not intended to reach another not so known or even so designated by the trade to which it is inseparably connected. * * * Surely not every article used in connection with a motor vehicle was intended to be taxed by the statute here involved. * * * Congress did not mention it in the statutes, and the doubt as to inclusion therein is made evident by the course of this proceeding."

IN CASE OF DOUBT, TAXING STATUTES ARE TO BE STRICTLY CONSTRUED AGAINST THE GOVERNMENT.

In the case of *Gould* v. *Gould*, 245 U. S. 151, cited by the Court of Claims in the *National Rubber Filler Co.* case, *supra*, the Supreme Court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are

construed most strongly against the Government, and in favor of the citizen."

And in *United States* v. *Merriam*, 263 U. S. 179, also cited by the Court of Claims in the *National Rubber Filler Co.* case, the Court said:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

In the case of *Atwater Kent Mfg. Co.* v. *United States*, 62 C. Cls. 419, the Chief Justice said in delivering the opinion of the Court (p. 425):

> "The context shows that the word 'parts' referred to in the acts should be given a restrictive meaning."

Again citing the *Martin Rocking Fifth Wheel Co.* case, we find that on this subject the Court said:

> "And we must be mindful of the primary rule that only those things can be taxed which are by the law specifically made the subject of the tax or at least are within the plain import of the language used. The right of the Commissioner of Internal Revenue to levy a tax is a right which must be affirmatively derived from the taxing act."

CONCLUSION.

Petitioner's speedometer replacement parts, like the products involved in the *Martin Rocking Fifth Wheel Co.* case, and the *Auburn Rubber Co.* case, *supra*, are not parts for articles enumerated in subdivision (1) or (2) of Sections 900 of the Revenue Acts of 1918 and 1921, or subdivision (1) or (2) of Section 600 of the Revenue Act of 1924, and were not, there-

fore, taxable under subdivision (3) of such sections. The taxes imposed under subdivision (3) were applicable only to sales of parts or accessories for articles enumerated in subdivisions (1) and (2), and not to parts of or accessories for articles enumerated in subdivision (3).

It is submitted that the decisions held by the Court of Claims to be controlling in the case were not in point, and that the decisions cited by petitioner herein are exactly in point; that the principle laid down in these cases should be applied in the present case, and that petitioner should recover the taxes paid by it on sales of speedometer replacement parts, with interest.

Respectfully submitted,

GEORGE M. WILMETH,
Attorney for Petitioner.

Transportation Building,
Washington, D. C.

Office Supreme Court,
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CHARLES ELMORE CR
CLE

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No. 851

In the Supreme Court of the United States

OCTOBER TERM, 1929

F. W. STEWART MANUFACTURING CORPORATION
PETITIONER
v.
THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 351

F. W. STEWART MANUFACTURING CORPORATION, petitioner

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the Court of Claims (R. 12) is not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered March 11, 1929. (R. 13.) Motion for a new trial was overruled June 3, 1929. (R. 13, 14.) Petition for a writ of certiorari was filed August 29, 1929. (R. 14.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether speedometer gears, drive chains or flexible shafts, and flexible housings for such chains or shafts, which the Court of Claims found were especially designed, manufactured, and sold for use on or in connection with automobiles and were not adapted to any other purpose or use, were taxable as automobile "parts" or "accessories" within the meaning of Section 900 (3) of the Revenue Act of 1921 and Section 600 (3) of the Revenue Act of 1924.

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations of the Commissioner of Internal Revenue are quoted on pages 2–6 of the Government's brief in opposition in *Bassick Manufacturing Company* v. *United States*, No. 350, which will be submitted at the same time as the present case.

STATEMENT

Petitioner brought suit in the Court of Claims to recover excise taxes in the sum of $4,624.89, plus interest, assessed against it during the period between October 1, 1921, and October 31, 1925, with respect to the manufacture and sale by it of speedometer gears, drive chains or flexible shafts, and flexible housings for such chains or shafts. (R. 3, 7, 10.)

In deciding against the petitioner the Court of Claims found the following facts (R. 11–12):

During the period in question, petitioner was engaged in the manufacture and sale of parts for automobile speedometers, particularly speedometer gears, drive chains or flexible shafts, and flexible housings for such shafts. The petitioner did not manufacture or sell complete speedometers. Said articles were especially designed, manufactured, and sold for use on or in connection with automobiles, and were not adapted to any other purpose or use. The excise taxes in question were paid with respect to said articles.

Flexible drive chains or shafts and housings are used on other machines than automobiles but those taxed to petitioner were especially manufactured and designed for use on speedometers which are used on automobiles.

ARGUMENT

The Court of Claims found that the articles taxed were "especially designed, manufactured, and sold for use on or in connection with automobiles and are not adapted to any other purpose or use." (R. 11.)

Petitioner contends, however, that while complete speedometers are taxable under the statutes, parts for such speedomoters are not "parts" or "accessories" for automobiles and are, therefore, not taxable. The answer to such a contention is

well expressed in the following language of Mr. Justice McKenna in *Worth Bros. Co.* v. *Lederer*, 251 U. S. 507, 509, 510:

> A shell is a definite article, constituted of materials of a certain kind and quality, assembled and fitted and finished so as to be adequate for its destructive purposes. Is not every element (we use the word for want of a better) in the aggregation or composition or amalgamation (whichever it is), of a shell, a part of it? If not, what is it? And what is the test to distinguish a part from not a part? We use the negative as an antithetic word does not occur to us to express that something necessary to constitute a thing is not a part of it. Petitioner surmounts the difficulty by contending that the law by its words "any part" of any of the "shells," implies a substantially finished part, as related to the whole structure and to the purpose it is intended to subserve. * * *
>
> We reject the contention. Congress did not intend to subject its legislation to such artificialities and make it depend upon distinctions so refined as to make a part of a shell not the taxable "part" of the law.

CONCLUSION

No question of general importance is presented by this case. The tax on automobiles parts and accessories was repealed in 1926. The judgment of

the court below was correct, and the petition for certiorari should be denied.

Respectfully submitted.

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OCTOBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929

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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 352

GEMCO MANUFACTURING COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 29, 1929

CERTIORARI GRANTED NOVEMBER 4, 1929

(34,483)

(34,483)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 352

GEMCO MANUFACTURING COMPANY,
PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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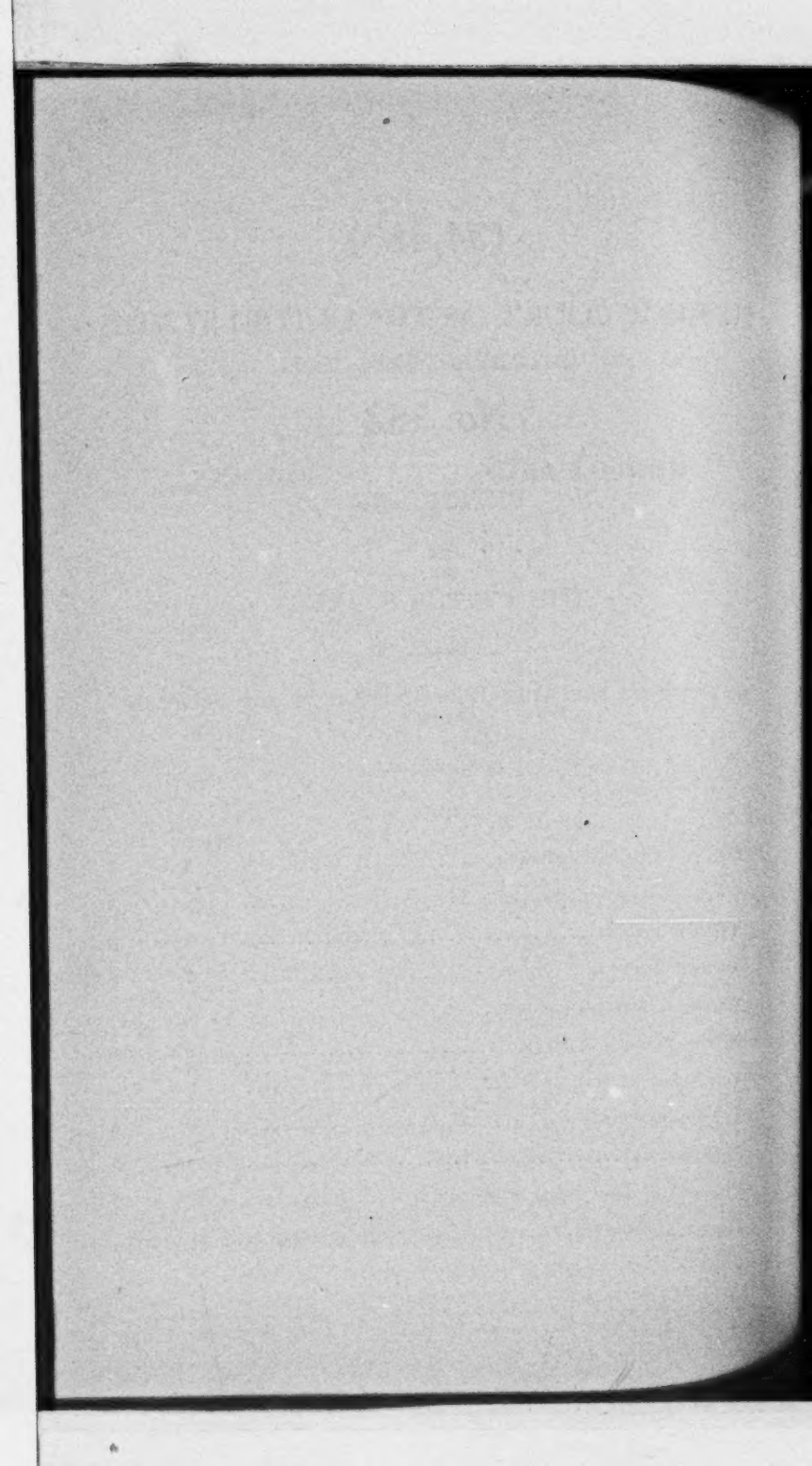

[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 352

GEMCO MANUFACTURING COMPANY, a Corporation,

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MAY IT PLEASE THE COURT: Your petitioner, Gemco Manufacturing Company, by its attorney, respectfully prays for a writ of certiorari to review the judgment of the United States Court of Claims in the above entitled cause.

Statement of the Case

The petitioner corporation is the manufacturer and distributor, among other things, of bumpers for use on automobiles of various makes and designs. It manufactures and sells not only complete bumper assemblies, ready to be affixed or attached to automobiles, but also manufactures and sells to the automotive trade replacement parts for such bumpers, such as bars, brackets and fittings. These bumper parts are sold as separate articles or items, and are used principally by garages and repairmen, to replace damaged and broken parts of bumpers. Separate and complete records are kept of all sales of bumper parts, as distinguished from complete bumpers or bumper assemblies.

On all sales of complete bumpers or bumper assemblies, petitioner corporation made proper return and payment of the tax imposed under subdivision (3) of Section 900 of the Revenue Act of 1921, and makes no contention that this tax was not properly and legally assessed and collected.

However, on sales of parts for bumpers, between the dates of November 1, 1922, and July 2, 1924, petitioner corpora-

tion was required to pay taxes in the amount of $32,040.86, notwithstanding the fact that the taxing statute imposed no tax on sales of *parts of accessories,* but only on sales of complete accessories.

Claim for refund of the $32,040.86 so paid on sales of bumper parts was duly filed with the Commissioner of Internal Revenue, and rejected or disallowed by the Commissioner, whereupon suit was instituted in the Court of Claims for recovery of this amount.

Subdivision (3) of Section 900 of the Revenue Act of 1921 (42 Stats. 227), under alleged authority of which the taxes sought to be recovered were levied, assessed, collected and paid, imposed a tax on the manufacturers' sale of "parts" *or* "accessories" for any of the articles *enumerated in subdivision* (1) *or* (2) of such section.

The articles enumerated in said subdivision (1) and (2), as found by the Court of Claims in its decision in the case of Martin Rocking Fifth Wheel Co. v. The United States (60 Ct. Cls. 466), are only (1) automobile trucks (2) automobile wagons (3) other automobiles, and (4) motor cycles. Bumpers are not enumerated in subdivision (1) or (2), but are "accessories", enumerated or included in subdivision (3), and it is the contention of petitioner corporation that since subdivision (3) of Section 900 of the Revenue Act of 1921 imposed a tax on sales of "parts" for only the articles enumerated in subdivisions (1) and (2), and not on sales of [fols. 2 & 3] parts for articles enumerated in subdivision (3), the taxes so paid by it were collected without authority of law.

The case presents for determination by the Court the question of whether bumper parts manufactured and sold by petitioner corporation are "parts" for articles enumerated in subdivision (1) or (2), within the meaning of subdivision (3) of Section 900 of the Revenue Act of 1921.

Reasons Relied on for Allowance of the Writ

The writ herein sought should issue for the following reasons:

1. The Court of Claims has decided an important question of Federal taxation which has not been, but should be settled by this Court.

2. The decision of the Court of Claims is contrary to the principle laid down by that Court in interpreting subdivision (3) of Section 900 of the Revenue Act of 1918 (40 Stats. 1122), which is identical to the provision of the 1921 Act here involved, in the case of *Martin Rocking Fifth Wheel Co.* v. *The United States*, 60 Ct. Cls. 466.

3. The decision of the Court of Claims is inconsistent with the decision rendered by itself, on February 4, 1929, in the case of the *Auburn Rubber Co.* v. *The United States*, interpreting the same provision of the taxing statute here involved, in which decision it was held that patches and reliners for tires enumerated in subdivision (3) were not subject to the tax imposed under that subdivision.

4. The decision of the Court of Claims violates the rule laid down in the cases of *Gould* v. *Gould* (245 U. S. 151) and *United States* v. *Merriam* (263 U. S. 179), heretofore universally followed by the Federal Courts, in that it extends the application of Section 900 (3) of the Revenue Act of 1921 so as to bring within its scope articles or things which are not enumerated or included therein.

Wherefore, your petitioner respectfully prays that a writ of certiorari to review the judgment of the Court of Claims herein may be granted.

George M. Wilmeth, Attorney for Petitioner, Transportation Building, Washington, D. C.

[fol. 1] IN THE COURT OF CLAIMS

No. F-292

GEMCO MANUFACTURING COMPANY, a Corporation, Claimant,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed September 13, 1926

To the Honorable the Court of Claims:

The Claimant, Gemco Manufacturing Company, respectfully represents to the Court that:

1. It is, and at all times mentioned herein has been, a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at Milwaukee, Wisconsin.

2. Claimant is the manufacturer and distributor, among other things, of bumpers for use on automobiles of various makes and designs. It manufactures and sells not only complete bumper assemblies, ready to be attached or affixed to automobiles, but also manufactures and sells to the automotive trade parts for such bumpers, such as bars, brackets, and fittings. The latter are sold as separate articles or items, and are used principally by garages and repairmen to replace damaged or broken parts of bumpers. Separate and complete records are kept of all sales of parts as distinguished from completed bumpers.

[fol. 2] 3. Section 900 of the Revenue Act of 1921 (42 Stats. 227) provided—

"That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof) 3 per centum.

(2) Other automobiles and motorcycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum.

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum."

Pursuant to the provisions of said Act, on or about January 6, 1922, the Commissioner of Internal Revenue, with

the approval of the Secretary of the Treasury, promulgated certain regulations, known as "Regulations No. 47 (Revised)," relating to the Excise Taxes on Sales by the Manufacturer under Section 900 of the Revenue Act of 1921, which said regulations provided, in part, as follows:

Art. 15. Definition of Parts.—A "part" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed or manufactured for the special purpose of being used as or to replace a component part of any such vehicle, and which by reason of some peculiar characteristics is not such a commercial commodity [fol. 3] as would ordinarily be sold for general use, and which is primarily adapted only for use as a component part of such vehicle.

Art. 16. Definition of Accessories.—An "accessory" for an automobile truck, automobile wagon, other automobile, or motorcycle is any article designed to be attached to or used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for use in connection with such vehicle, whether or not essential to its operation.

4. Between the dates of November 1, 1922, and July 2, 1924, there were levied, assessed against, and collected from claimant, and paid by claimant to the United States Collector of Internal Revenue at Milwaukee, Wisconsin, taxes in the amount of $32,040.86 on sales by claimant of parts for bumpers, as hereinbefore described. Said taxes were purported to have been levied, assessed, and collected under the provisions or authority of subdivision three (3) of Section 900 of the Revenue Act of 1921, supra.

On or about March 16, 1926, claimant filed with the Commissioner of Internal Revenue a claim for refund of said sum of $32,040.86 alleging as reasons for the allowance of said claim, in substance, as follows:

(a) That the amount claimed was paid on bumper parts —bars, brackets, and other bumper parts,—sold separately, and not as a part of a complete bumper assembly.

(b) That since subdivision (3) of Section 900 of the Revenue Act of 1921 imposed a tax on the manufacturer's

sale of parts of accessories for articles enumerated in subdivisions (1) or (2); and that since accessories were not enumerated in subdivisions (1) or (2), there was no authority of law for taxing sales of parts for accessories when sold separately.

[fol. 4] 5. In a letter from the Acting Commissioner of Internal Revenue bearing date of August 27, 1926, claimant was advised of the rejection of said claim for refund as follows:

Reference is made to your claim filed for refund of $32,040.86, representing manufacturer's excise tax paid for the months of December, 1922, to September, 1924, inclusive.

The claim is based upon the contention that the amount claimed was paid on the sale of bumper bars, brackets, and other bumper parts sold separately, and you consider that parts of automobile parts or accessories are not properly taxable, and that tax paid thereon should be refunded.

You are advised that bumper brackets and bumper bars are properly subject to tax as automobile parts under Section 900 of the Revenue Act of 1921, and Section 600 of the Revenue Act of 1924, even though sold separately.

It was suggested under several dates that in the event you had a list showing bumper parts other than bars or brackets on which a portion of this tax was paid, that such list be submitted and the amount of tax paid on each class of articles be shown thereon.

In reply to these letters you advised that the amount which was paid on fittings other than bars and brackets is too small to warrant the compilation of the figures, and you prefer to have the claim considered as a whole rather than to segregate the amount of tax applying to fittings, which this office might consider not to be subject to tax. Therefore, since bumper bars and brackets are, as stated above, properly subject to tax as automobile parts, and no evidence has been presented to show what portion, if any, of the tax claimed was paid on the sale of nontaxable articles, the entire amount claimed is considered to have been correctly paid, and the claim is accordingly rejected.

[fol. 5] 6. Claimant is advised by counsel, and therefore avers, that the taxes collected from it on the sale of bumper

parts, as aforesaid, are illegal and erroneous and were illegally and erroneously assessed and collected by the United States of America through said Collector of Internal Revenue at Milwaukee, Wisconsin, without warrant or authority of law, for the following reasons:

(a) Subdivision (3) of Section 900 of the Revenue Act of 1921 imposed a tax of 5 per centum only on the sales of "* * * parts or accessories" for articles enumerated in subdivision (1) or (2) of said Section; that is to say, parts or accessories for automobile trucks or wagons, other automobiles and motor cycles.

(b) A bumper is an accessory for an automobile, or, in other words, it is one of the articles enumerated in subdivision (3) of Section 900 of the Revenue Act of 1921.

(c) The Revenue Act of 1921 contains no provision, either in Section 900 or elsewhere, authorizing the imposition of any tax on the sale or lease of "parts" for any of the articles enumerated in subdivision (3) of Section 900 thereof.

Claimant therefore claims from the United States the sum of $32,040.86, with interest at the rate of six (6) per centum per annum, as provided by law.

7. No action upon this claim other than herein set forth has been had before Congress or any other of the departments of the Government. Claimant is a citizen of the United States, and has at all times borne true allegiance to the Government of the United States and has not at any time in any way aided, abetted or given encouragement to [fol. 6] rebellion against said Government; it is the sole owner of the claim herein stated, and no part of said claim has ever been sold, assigned or discharged, and it is justly entitled to the amount herein claimed from the United States after allowing all just credits and off-sets.

And the claimant claims $32,040.86 with interest at the rate of six (6) per centum per annum, as provided by law.

Gemco Manufacturing Company, by George M. Wilmeth, Attorney for Claimant, Transportation Building, Washington, D. C.

Duly sworn to by George M. Wilmeth. Jurat omitted in printing.

[fol. 7] II. General Traverse—Filed November 12, 1926

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

III. Argument and Submission

On February 4, 1929, this case was argued and submitted on merits by Mr. George M. Wilmeth, for the plaintiff, and by Mr. Ralph C. Williamson, for defendant.

[fol. 8] IV. **Special Findings of Fact, Conclusion of Law, and Memorandum by the Court**—Filed March 11, 1929

This case, having been heard by the Court of Claims, the Court, upon the evidence, makes the following

Special Findings of Fact

I

Plaintiff is and at all times mentioned herein has been a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at Milwaukee, in that State.

II

Plaintiff was during the period in question engaged in the manufacture, sale, and distribution, among other things, of bumpers for automobiles, and bars, brackets, and fittings for use as replacement parts of such bumpers.

Said articles were especially designed, manufactured, and sold for use on or in connection with automobiles, and are not adapted for any other purpose or use. With respect to the manufacture and sale of such articles, plaintiff, during the period in question, made returns for paid excise

taxes for the amount of $32,040.86. Claim for refund in proper form and in due time was filed by plaintiff. Said claim for refund was rejected by the Commissioner of Internal Revenue.

III

Plaintiff is a citizen of the United States, and it and its officers and directors have always borne true allegiance to the Government of the United States, and have never voluntarily aided, abetted, or given encouragement to rebellion against said Government. No part of the claim sued for has ever been sold, assigned, or satisfied.

[fol. 9] CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be ascertained by the clerk and collected by him according to law.

MEMORANDUM

The issue involved in this case has been many times before the court. The case, we think, falls within the following decisions: Cole Storage Battery Co. v. United States, 65 C. Cls. 164; Walker Mfg. Co. v. United States, 65 C. Cls. 394; Advance Automobile Accessories Corporation v. United States, No. H-3 decided October 22, 1928; Carbon Steel Co. v. Lewellyn, 251 U. S. 501; Forged Steel Wheel Co. v. Lewellyn, 251 U. S. 511; Worth Bros. Co. v. Lederer, 251 U. S. 507. The petition will be dismissed. It is so ordered.

[fol. 10] V. JUDGMENT

At a Court of Claims held in the City of Washington on the 11th day of March, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record herein, the amount thereof to be ascertained by the clerk and collected by him according to law, which amount is found to be $26.22.

VI. Proceedings After Entry of Judgment

On May 10, 1929, the plaintiff filed a motion for a new trial.

On June 10, 1929, the court entered the following order on said motion:

Order

It is ordered this 10th day of June, 1929, that the plaintiff's motion for new trial be and the same is overruled.

[fol. 11] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,483. Court of Claims. Term No. 352. Gemco Manufacturing Company, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed August 29, 1929. File No. 34,483.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 4, 1929

The petition herein for a writ of certiorari to the Court of Claims is granted, and the case is assigned for argument with cases Nos. 127 and 275 as one case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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CHARLES ELMORE C

IN THE

Supreme Court of the United States.

October Term, 1929.

No. 352.

GEMCO MANUFACTURING COMPANY, a Corporation,
Petitioner,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

GEORGE M. WILMETH,
Attorney for Petitioner.

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IN THE

Supreme Court of the United States.

October Term, 1929.

No. 352.

GEMCO MANUFACTURING COMPANY, a Corporation,
Petitioner,

v.

THE UNITED STATES.

OPINION OF THE COURT BELOW.

The opinion of the Court of Claims (R. 9–10) was announced on March 11, 1929, but has not yet been reported.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

The petitioner corporation is the manufacturer and distributor, among other things, of bumpers for use on automobiles of various makes and designs. It manufactures and sells not only complete bumper assemblies, ready to be affixed or attached to automobiles, but also manufactures and sells to the automotive trade replacement parts for such bumpers, these replacement parts consisting of bars, brackets and fittings. These bumper parts are sold as separate articles or items, and are used principally by garages and repairmen, to replace damaged and broken parts of bumpers. Separate and complete records are kept of all sales of bumper parts, as distinguished from complete bumpers or bumper assemblies.

On all sales of complete bumpers or bumper assemblies, pe-

titioner corporation made proper return and payment of the tax imposed under subdivision (3) of Section 900 of the Revenue Act of 1921, and makes no contention that this tax was not properly and legally assessed and collected.

However, on sales of parts for bumpers, between the dates of November 1, 1922, and July 2, 1924, petitioner corporation was required to pay taxes in the amount of $32,040.86, notwithstanding the fact that the taxing statute imposed no tax on sales of *parts for accessories*, but only on sales of complete accessories.

Claim for refund of the $32,040.86 so paid on sales of bumper parts was duly filed with the Commissioner of Internal Revenue, and rejected or disallowed by the Commissioner, whereupon suit was instituted in the Court of Claims for recovery of this amount.

Subdivision (3) of Section 900 of the Revenue Act of 1921 (42 Stats. 227), under alleged authority of which the taxes sought to be recovered were levied, assessed, collected and paid, imposed a tax on the manufacturers' sale of "parts" or "accessories" for any of the articles *enumerated in subdivision (1) or (2)* of such section.

The articles enumerated in said subdivisions (1) and (2), as found by the Court of Claims in its decision in the case of *Martin Rocking Fifth Wheel Co.* v. *The United States* (60 Ct.Cls. 466), are (1) automobile trucks, (2) automobile wagons, (3) other automobiles, and (4) motor cycles. Bumpers are not enumerated in subdivision (1) or (2), but are "accessories," enumerated or included in subdivision (3), and it is the contention of petitioner corporation that since subdivision (3) of Section 900 of the Revenue Act of 1921 imposed a tax on sales of "parts" for only the articles enumerated in subdivisions (1) and (2), and not on sales of parts for articles enumerated in subdivision (3), the taxes so paid by it were collected without authority of law.

QUESTION TO BE DECIDED.

The case presents for determination by the Court the question of whether bumper parts manufactured and sold by pe-

titioner corporation are "parts" for articles enumerated in subdivision (1) or (2), within the meaning of subdivision (3) of Section 900 of the Revenue Act of 1921.

STATUTES AND DEPARTMENTAL REGULATIONS INVOLVED.

The provisions of Section 900 of the Revenue Act of 1921 (42 Stats. 227), under alleged authority of which the taxes involved were levied, assessed, collected and paid; and the pertinent provisions of the Departmental Regulations (No. 47) relating thereto, are quoted at pages 4 and 5 of the record herein.

ASSIGNMENTS OF ERROR.

I.

The question decided by the Court of Claims is an important one involving interpretation of a Federal taxing statute which has not been, but should be, definitely settled by this Court, in justice to many manufacturers of parts for accessories on sales of whose products taxes have been levied without authority of law.

II.

The decision of the Court of Claims is contrary to the principle laid down by that Court in interpreting subdivision (3) of Section 900 of the Revenue Act of 1918 (40 Stats. 1122), the language of which is identical with that of the provision of the 1921 Act here involved, in the case of the *Martin Rocking Fifth Wheel Co.* v. *The United States*, 60 C. Cls. 466.

III.

The decision of the Court of Claims is inconsistent with the decision rendered by that Court, on February 4, 1929, in the case of the *Auburn Rubber Co.* v. *The United States* (No. H-433), interpreting the same provision of the taxing statute here involved, in which decision it was held that patches and reliners for tires enumerated in subdivision (3) were not subject to the tax imposed under that subdivision.

IV.

The decision of the Court of Claims violates the rule laid down in the cases of *Gould* v. *Gould* (245 U. S. 151) and *United States* v. *Merriam* (263 U. S. 179), heretofore universally followed by the Federal Courts, in that it extends the application of Section 900 (3) of the Revenue Acts of 1921 so as to bring within its scope articles or things which are not enumerated or included therein.

ARGUMENT.

The decision of the Court of Claims states that the issue involved has been many times before the Court, in the cases cited therein. It is respectfully pointed out that this statement by the Court is in error. In the present case, the sole question involved is whether subdivision (3) of Section 900 imposed a tax on sales of parts for articles enumerated in that subdivision.

In the cases of the *Cole Storage Battery Co.* v. *The United States*, 65 C. Cls. 164, and *Walker Mfg. Co.* v. *United States*, 65 C. Cls. 394, referred to by the Court, the question involved was not the taxability of parts of batteries or parts of jacks. As a matter of fact, the Treasury Department had held that parts of storage batteries and parts of lifting jacks *were not subject to tax* under subdivision (3) as "parts for articles enumerated in subdivision (1) or (2)." (S. T. 367–C. B. 6–1922–p. 443). The question presented for determination by the Court in these two cases was whether complete storage batteries and complete lifting jacks were "parts or accessories for automobiles," as distinguished from commercial commodities adaptable for general use, and the Court properly held that they were such "parts or accessories" within the meaning of the taxing Acts.

In the case of *Advance Automobile Accessories Corporation* v. *United States*, 66 C. Cls. 304, referred to by the Court, the question involved was whether the statute imposed a tax on repair material, and whether the operation of clipping a non-taxable repair material into short lengths of the approximate measurement for relining a transmission band constituted the manufacture of an automobile part.

In the cases of *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501, *Forged Steel Wheel Co.* v. *Lewellyn*, 251 U. S. 511, and *Worth Bros. Co.* v. *Lederer*, 251 U. S. 507, referred to by the Court, the question to be determined was whether certain articles specifically taxed by the statute there involved were taxable when sold by the manufacturers thereof in a more or less unfinished condition.

The statute involved in these last three cases (Par. 301, 39 Stat. at L. Ch. 463; p. 781; Comp. Stat. Par. 6336¼b., Fed. Stat. Anno. Supp. 1918, p. 350) imposed a tax, not upon the sales price, but upon the *profits* derived from the manufacture of "projectiles, shells or torpedoes, * * * or *any part of any of the articles mentioned*."

The statute involved in the present case does not use such broad and inclusive language, but definitely specifies the "parts" to be taxed. Subdivisions (1) and (2) of Section 900 of the Revenue Act of 1921 imposed certain taxes upon the manufacturers' selling price of complete automobile trucks, automobile wagons, other automobiles and motor cycles, and, recognizing that *replacements* on automobiles became necessary from time to time, and that such *replacements* could properly bear a like burden, Congress imposed under subdivision (3) a tax on the manufacturers' selling price of "tires, inner tubes, parts or accessories for any of the articles *enumerated in subdivision (1) or (2)*." It is submitted that this definite mention of articles enumerated in subdivision (1) or (2) is very much more restrictive than the broad term "*any part of*" used in the Munitions Tax Act, and was designed for the purpose of levying a tax on the sale, *for replacement purposes*, of complete "tires," "inner tubes," "accessories" and "parts" for the articles enumerated in subdivisions (1) and (2), when such complete units were needed as replacements, and was not intended to tax parts or materials sold for use in repairing or reconditioning, and thus prolonging the life of articles enumerated in subdivision (3). (*National Rubber Filler Co.* v. *United States*, 63 C. Cls. 337.) If Congress had desired to tax parts for articles enumerated in subdivision (3), it would have been a simple matter to definitely accomplish this purpose by inserting after the words "subdivision (1) or (2),"

the words "*or in this subdivision,*" but this was not done, and petitioner submits that the language used was not intended to impose a tax upon parts for articles enumerated in subdivision (3).

The Treasury Department, as a general rule, has adopted this interpretation, as is indicated by its ruling on plate glass. (O. D. 133, S. T. 621–257.) In this ruling it was held that "plate glass cut to size and shape for use in automobile windshields is not subject to tax unless sold mounted in new frames." This shows that the Bureau interpreted the law as intending not to tax the repair of an old, broken windshield, by the installation of new glass, but only the sale of a complete new windshield, including the glass and frame. The same principle was laid down in the Departmental ruling on top recovering, S. T. 392–I–39–525 held that the recovering of old automobile top bows was not subject to tax, but that the sale of a complete new top, including top bows and bow sockets, was taxable. This interpretation of the statute was also followed in the ruling on radiators. A complete radiator, consisting of the core and upper and lower tanks, soldered together, was held taxable as a "part," but S. T. 448–III–19–1552 held that radiator cores and upper and lower tanks, sold separately, were not subject to the tax imposed by subdivision (3).

Among other articles which have been held nontaxable in accordance with this interpretation of the statute may be mentioned the following: Parts of generators, parts of starters, parts of magnetos, cross chains for anti-skid chains, top decks, side quarters, back curtains, plate glass cut to size and shape for doors and windows, chains cut to length, retread bands for tires, reliners for tires, parts of distributors, spokes and felloes for wheels, etc. (See list of articles held nontaxable, pages 123–4, Record of Hearing before the Subcommittee of the House Committee on Appropriations on First Deficiency Appropriation Bill, 1927, 69th Congress, Second Session; also O. D. 100, S. T. 4–21–215; S. T. 394, C. B. December, 1922, p. 295, and Par. 2012–32, C. C. H. Tax Service, 1927.)

In the *Worth Bros. Co.* case, *supra*, an entirely different class of tax was involved. It was not measured by the sales price, as under Section 900, but by the profit realized, and the Muni-

tions Tax Act made no separation of the complete projectiles and the parts thereof. They were all grouped together under one provision of the Act, and the profits on all were taxed at the same rate. The term "any part of," used in that Act, did not permit of a distinction between a semi-finished and a finished part, and the language of the statute makes it clear that Congress intended to tax not only manufacturers of complete shells, torpedoes and projectiles, but every person making a profit from the manufacture and sale of any and all parts of such articles.

As stated above, the questions involved in all of the cases mentioned in the decision of the Court of Claims are entirely different from the one involved in the present case. Petitioner freely admits that complete bumpers manufactured and sold by it were taxable under the provisions of subdivision (3) of Section 900, but contends that subdivision (3) imposed no tax on sales of parts for articles enumerated in that subdivision.

SUBDIVISION (3) IMPOSED NO TAX UPON PARTS FOR ARTICLES ENUMERATED IN SUBDIVISION (3) BUT ONLY UPON PARTS FOR ARTICLES ENUMERATED IN SUBDIVISIONS (1) AND (2).

The sole question presented, then, is what are the articles enumerated in subdivisions (1) and (2)?

Consideration of the provisions of the statute, and the purpose of the language used, must necessarily lead to the conclusion that, for the purposes of subdivision (3), the only articles *enumerated* in said subdivisions (1) and (2) are the *complete vehicles* specified therein.

The first clause or paragraph of Section 900 provides for a tax on sales made by only the *manufacturer*, *producer* or *importer*. Subdivision (1) specifies the rate of tax to be paid by such manufacturers, producers and importers, on sales of complete automobile trucks and automobile wagons. Subdivision (2) specifies the rate of tax to be paid on sales of all other complete automobiles and motor cycles. These taxes were payable only on sales made by the manufacturer, producer or importer, and no tax was imposed on the resale by the distributor or dealer.

After providing for a tax on the sale of the complete vehicles enumerated in subdivisions (1) and (2), Congress further provided, in subdivision (3), for a tax on tires, inner tubes, replacement parts and accessories, when sold by the manufacturer, producer or importer thereof "*to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2)*" (i. e. complete automobile trucks, automobile wagons, other automobiles and motor cycles). By making the tax under this subdivision applicable only to *sales to persons other than manufacturers* liable for the taxes imposed under subdivisions (1) and (2), specific exemption was provided for sales made *to such manufacturers*. The clear intent and purpose of this exemption of sales to such manufacturers and producers is to avoid a double tax on any portion of the complete vehicles which are specifically taxed as such under subdivisions (1) and (2).

The reason for providing this exemption of sales of parts and accessories to manufacturers of the complete vehicles, as well as the reason for the use of the word "producer," was the well recognized fact that many automobiles were an entirely assembled product, and that the "producers" thereof actually manufactured nothing. The bodies, engines, radiators, axles, wheels, rims, tires, springs, fenders, etc., from which the complete cars were assembled by such producers were all made by different manufacturers of the respective articles, and the purpose of the Act was to levy a tax on the producer's sale of the complete vehicle, and then, if replacement of any of the component parts, or of the accessories, became necessary, to levy a tax on the sale of such *replacements* or extra equipment, by the manufacturers thereof. The fact that the word "importer" was omitted from subdivision (3) is significant on this point, as showing that there was no intent to exempt sales of parts or accessories when made to the importer of cars completely manufactured in a foreign country.

After providing exemption for articles enumerated in subdivision (3), when sold to manufacturers or producers of complete vehicles, because of the fact that the tax levied by Section 900 applied to sales made only by the *actual manufacturer, producer* or *importer*, it was necessary, in order to insure collec-

tion of tax on any parts or accessories purchased by the producer of the complete car under this exemption, and sold as extra equipment (rather than as component parts of the complete vehicle) to make the terms "automobile trucks," "automobile wagons," "other automobiles" and "motor cycles" inclusive of this extra equipment, and this was done by inserting, parenthetically, in subdivisions (1) and (2), the words "(including tires, inner tubes, parts, and accessories therefor, *sold thereon or in connection therewith or with the sale thereof*)."

Since the situation with regard to the manufacture or production of tires, inner tubes, parts, and accessories is entirely different from that existing with respect to the production of complete automobiles, there was no reason to provide for exemption of sales of "parts" for the articles enumerated in subdivision (3), to manufacturers or producers. The articles enumerated in subdivision (3) are not produced by the assembling of "parts" for the same purchased from various manufacturers. Each tire, inner tube, part, or accessory, is wholly manufactured and sold in the finished state by the manufacturer thereof, and there could be no danger of a double tax having been paid on any portion of the same when sold by him.

It must follow, therefore, that if there was no danger of a double tax on the manufacturer's sale of tires, inner tubes, parts, or accessories manufactured by him, *there was no reason for providing exemption for sales of parts of the same*, and that the word "parts" used in subdivision (3) must, accordingly, mean only *parts for the complete vehicles enumerated in subdivisions (1) and (2)*, and not parts for any of the extra equipment parenthetically mentioned in these subdivisions.

If it is held that the term "any of the articles enumerated in subdivision (1) or (2)" means not only the complete vehicles specified, but also the articles parenthetically mentioned, then it must necessarily be held, also, that any manufacturer of tires, inner tubes, parts, or accessories was entitled to exemption on all sales of his product made to any other manufacturer of tires, inner tubes, parts, or accessories. Such a construction of the statute would open the door for serious evasions of tax. Under such a construction, a manufacturer of tires, for instance, would

be legally entitled to sell his entire product, *tax free*, to a manufacturer of bumpers, and since the tax is collectible only from the *actual* manufacturer or producer, and since there is no provision in subdivision (3) requiring a manufacturer of bumpers to pay tax on sales of his product (including tires, inner tubes, parts, or accessories, sold in connection with the sale thereof), such manufacturer of bumpers could resell the tires purchased by him from the tire manufacturer under the statutory exemption, without incurring liability under the statute for any tax other than that due on sales of products actually manufactured by him.

The position that the term "parts" as used in subdivision (3) related only to parts for the complete vehicles enumerated in subdivisions (1) and (2) is supported by the decision in *Martin Rocking Fifth Wheel Co.* v. *United States* (60 C. Cls. 466), wherein the Court, interpreting identical language of the Revenue Act of 1918 (40 Stats. 1122), said:

> "'Parts' as used in that paragraph, are 'parts' *for* [italics ours] the articles enumerated in paragraphs (1) and (2), which are 'automobile trucks,' 'automobile wagons,' 'other automobiles,' and 'motor cycles,' 'except tractors.'"

Bumpers are not enumerated in subdivision (1) or (2), and neither are they "parts" for articles enumerated in those subdivisions. They are *accessories* for the vehicles enumerated in subdivisions (1) and (2). They are not necessary to the operation of the vehicle, but are attached merely for the purpose of affording protection in case of collision. It is a well known fact, of which the Court may properly take judicial notice, that it is only within comparatively recent years that bumpers have been used on automobiles. This fact definitely determines the character of the bumper as an "accessory," as distinguished from a "part." "Accessories" are not enumerated in subdivisions (1) and (2).

The parenthetical mention of tires, inner tubes, parts, and accessories in subdivisions (1) and (2) manifestly was intended for the sole purpose of fixing the rate of tax which should be paid on such parts and accessories when sold as a part of or as extra equipment in connection with the sale of the vehicles

enumerated in those subdivisions, namely, automobile trucks, automobile wagons, other automobiles and motor cycles. If such parts or accessories were sold with either of the two first named vehicles, the rate of tax was 3 per centum; while if sold with either of the two last named vehicles, the rate was 5 per centum. That, it is submitted, was the plain intent and sole purpose of the framers of the Act. Certainly the parenthetical mention in subdivisions (1) and (2) of tires, inner tubes, parts, and accessories did not mean and was not intended as an "enumeration" of these articles, for the purposes of subdivision (3).

To say that the parenthetical mention of parts and accessories in subdivision (2) constitutes an *enumeration* thereof is just exactly as reasonable as to say that the mention of the word "tractors" in the same subdivision constitutes an *enumeration* of such vehicles for the purposes of subdivision (3), and that consequently parts and accessories for tractors were taxed by subdivision (3), even though tractors were specifically exempted from the tax imposed by subdivision (2). Petitioner does not believe that this Court would subscribe to such a construction of the statute here involved, but such would be the result or effect of consistent application of the Department's holding that subdivision (3) of Section 900 of the Revenue Act of 1921 imposed a tax on parts of articles parenthetically included or in any way mentioned in subdivisions (1) and (2) of that section.

Treasury Department Regulations No. 47, Article 15 (R. 5) defines a "part" *for the vehicles enumerated* as "any article designed for the special purpose of being used *as or to replace a component part* of any such vehicle, * * *." Article 16 (R. 5) defines an accessory for the vehicles enumerated as "any article designed *to be attached to or used in connection with* such vehicle * * *." These definitions from the Departmental Regulations show not only that the Department made a clear distinction between "parts" and "accessories," but also that it was defining "parts" for the *vehicles* and "accessories" for the *vehicles*, and not parts or accessories for any of the other articles mentioned in subdivisions (1) and (2). However, notwithstanding this clear distinction between a "part" and an "accessory," the Department, in rejecting pe-

titioner's refund claim, stated that the claim was rejected for the reason that the Department held the articles involved where "*parts for automobiles*" within the meaning of the taxing statute. In spite of this manifestly erroneous statement, the Court of Claims upheld the action of the Department, apparently without realizing that there is a very definite distinction between a "part for an automobile" and an "accessory for an automobile," and that a "part for an accessory" is in no sense a "part for an automobile."

The Court of Claims held, in the case of the *Auburn Rubber Co.* v. *The United States* (H–433), decided February 4, 1929, that blow-out patches and reliners for tires were not taxable as parts or accessories for articles enumerated in subdivision (1) or (2). Obviously, the only theory on which this decision can be based is that the products involved are not accessories for articles enumerated in subdivision (1) or (2), *but are accessories for tires, enumerated in subdivision* (3). Petitioner submits that if "accessories" for articles enumerated in subdivision (3) are not subject to the tax imposed by that subdivision, then it necessarily follows that "parts" for articles enumerated in subdivision (3) are nontaxable for the same reason.

In the case of the *National Rubber Filler Co.* v. *The United States*, 63 C. Cls. 337, the product involved was neither a part nor an accessory for any of the vehicles enumerated in subdivision (1) or (2). It was an accessory for a tire, enumerated in subdivision (3), and the Court of Claims held that it was not within the power of the Commissioner of Internal Revenue to extend the provisions of the taxing statute so as to bring such a product within its scope. In discussing the question of whether the words "parts" and "accessories" used in the taxing statutes could be properly construed to include the rubber filler involved, the Court said:

> "Beyond doubt the articles enumerated specifically in subdivision (3) of Section 900 have no common meaning. Otherwise it would have been unnecessary to specify. In similar revenue legislation the same course has been pursued by Congress, and articles subjected to taxation carefully enumerated specifically. Reference to an article by its fixed trade name was obviously not intended to

reach another not so known or even so designated by the trade to which it is inseparably connected. * * * Surely not every article used in connection with a motor vehicle was intended to be taxed by the statute here involved. * * * Congress did not mention it in the statutes, and the doubt as to inclusion therein is made evident by the course of this proceeding."

IN CASE OF DOUBT, TAXING STATUTES ARE TO BE STRICTLY CONSTRUED AGAINST THE GOVERNMENT.

In the case of *Gould* v. *Gould*, 245 U. S. 151, cited by the Court of Claims in the *National Rubber Filler Co.* case, *supra*, the Supreme Court said:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

And in *United States* v. *Merriam*, 263 U. S. 179, also cited by the Court of Claims in the *National Rubber Filler Co.* case, the Court said:

"On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

In the case of *Atwater Kent Mfg. Co.* v. *United States*, 62 C. Cls. 419, the Chief Justice said in delivering the opinion of the Court (p. 425):

"The context shows that the word 'parts' referred to in the acts should be given a restrictive meaning."

Again citing the *Martin Rocking Fifth Wheel Co.* case, we find that on this subject the Court said:

"And we must be mindful of the primary rule that only those things can be taxed which are by the law specifically made the subject of the tax or at least are within the plain import of the language used. The right of the Commissioner of Internal Revenue to levy a tax is a right which must be affirmatively derived from the taxing act."

CONCLUSION.

Petitioner's bumper replacement parts, like the products involved in the *Martin Rocking Fifth Wheel Co.* case, and the *Auburn Rubber Co.* case, *supra*, are not parts for articles enumerated in subdivision (1) or (2) of Section 900 of the Revenue Act of 1921, and were not, therefore, taxable under subdivision (3) of such section. The taxes imposed by subdivision (3) were applicable only to sales of parts of or accessories for articles enumerated in subdivisions (1) and (2), and not to parts of or accessories for articles enumerated in subdivision (3). While it is true that the bumpers for the repair of which the replacement parts involved were designed were attached to automobiles, and that petitioner's bumper replacement parts were, therefore, eventually attached to automobiles, as stated by the Court of Claims in the case of the *Atwater Kent Manufacturing Co., supra*, "The question is not whether they were 'parts' of *something* after they were attached to the one or another kind of machine to which they were attached and in which they could function, but whether they were sold as *parts of the articles mentioned in subdivisions (1) or (2)* of Section 900." (Italics supplied.)

It is submitted that the decisions followed by the Court of Claims are not in point, and that the decisions cited by petitioner herein are exactly in point; and that the principle laid down in these cases should be applied in the present case, and that petitioner should recover the taxes paid by it on sales of bumper replacement parts, with interest.

Respectfully submitted,

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FILED
OCT 25 1929
CHARLES ELMORE CROPLEY
CLERK

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No. 352

In the Supreme Court of the United States

OCTOBER TERM, 1929

GEMCO MANUFACTURING COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The memorandum opinion of the Court of Claims (R. 9) is not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered March 11, 1929. (R. 9, 10.) Motion for a new trial was overruled June 10, 1929. (R. 10.) Petition for a writ of certiorari was filed August 29, 1929. (R. 10.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether bars, brackets, and fittings for use as replacement parts of automobile bumpers, manufactured and sold by petitioner, were taxable as au-

tomobile "parts" or "accessories" within the meaning of Section 900 (3) of the Revenue Act of 1921.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and regulations of the Commissioner of Internal Revenue are quoted on pp. 2–6 of the Government's brief in opposition in *Bassick Manufacturing Company* v. *United States*, No. 350, which will be submitted at the same time as the present case.

STATEMENT

Petitioner brought suit in the Court of Claims for the recovery of excise taxes in the sum of $32,040.86, plus interest thereon, assessed against it with respect to the manufacture and sale of bars, brackets, and fittings for use as replacement parts of automobile bumpers, for the period between November 1, 1922, and July 2, 1924. (R. 3, 5, 7.)

In deciding against the petitioner the Court of Claims found the following facts (R. 8–9):

Petitioner, during the period in question, was engaged in the manufacture, sale, and distribution of bumpers for automobiles, and bars, brackets, and fittings for use as replacement parts of such bumpers. Said articles were especially designed, manufactured, and sold for use on or in connection with automobiles and are not adapted for any other purpose or use.

ARGUMENT

The Court of Claims found that the articles taxed were "especially designed, manufactured, and sold

for use on or in connection with automobiles, and are not adapted for any other purpose or use." (R. 8.)

Petitioner contends, however, that while complete bumper assemblies are taxable under the statute, replacement parts for such bumpers are not "parts" or "accessories" for automobiles and are therefore not taxable. The answer to such a contention is well expressed in the language of Mr. Justice McKenna in *Worth Bros. Co.* v. *Lederer,* 251 U. S. 507, 509, quoted in our brief in opposition in *F. W. Stewart Manufacturing Corporation* v. *United States,* No. 351, October Term, 1929.

CONCLUSION

No question of general importance is presented by this case. The tax on automobile parts and accessories was repealed in 1926. The judgment of the court below was correct and the petition for certiorari should be denied.

Respectfully submitted.

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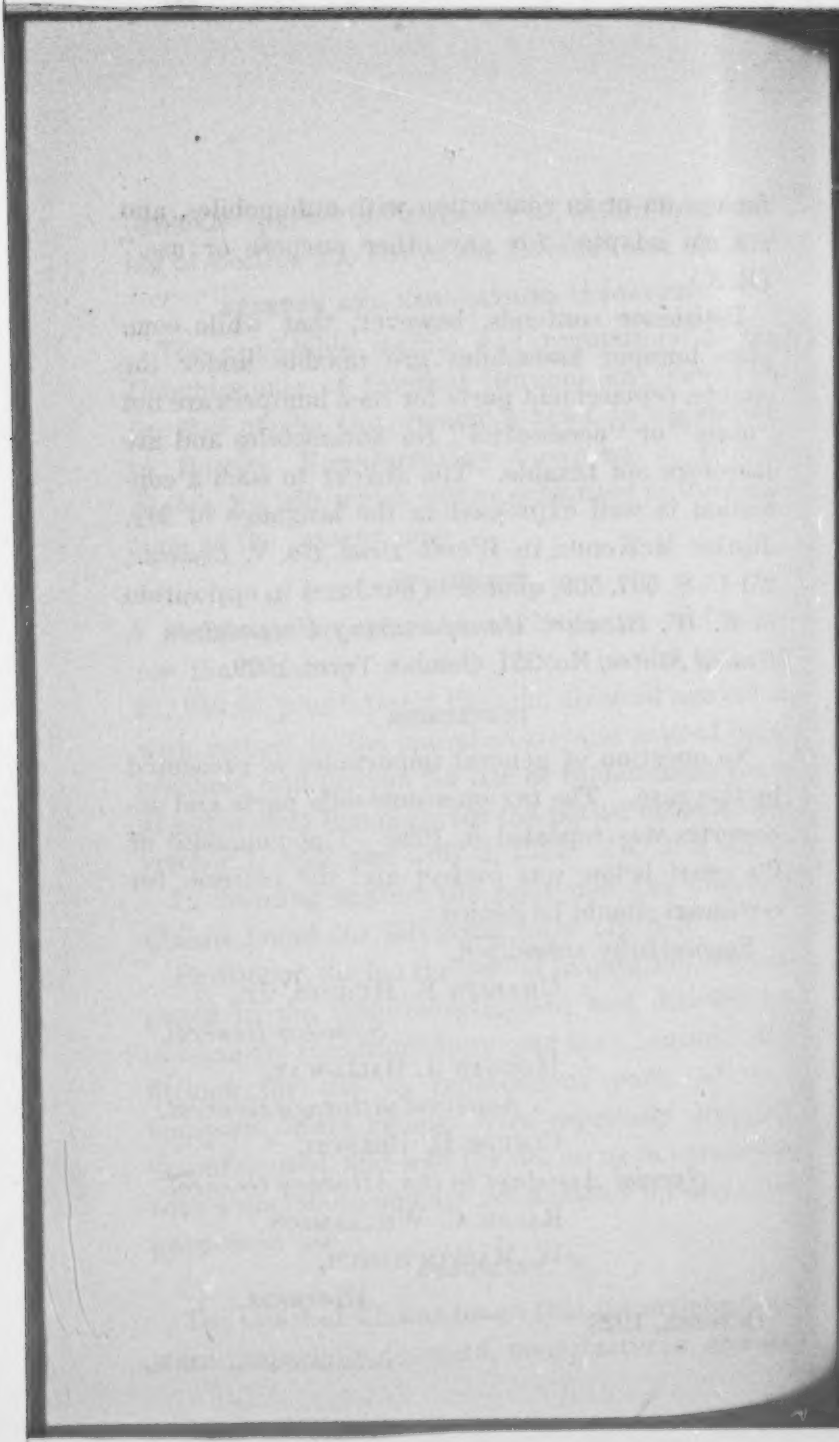
OCTOBER, 1929.

U. S. GOVERNMENT PRINTING OFFICE: 1929



SUPREME COURT OF THE UNITED STATES.

Nos. 127, 275, 350, 351 and 352.—October Term, 1929.

Universal Battery Company, Petitioner,		
127	*vs.*	
The United States.		
Vesta Battery Corporation, Petitioner,		
275	*vs.*	
The United States.		
The Bassick Manufacturing Company, Petitioner,		Certiorari to the Court of Claims.
350	*vs.*	
The United States.		
F. W. Stewart Manufacturing Corporation, Petitioner,		
351	*vs.*	
The United States.		
Gemco Manufacturing Company, Petitioner,		
352	*vs.*	
The United States.		

[May 26, 1930.]

Mr. Justice Van Devanter delivered the opinion of the Court.

These are cases brought against the United States to recover taxes paid under § 900 of the Revenue Acts of 1918 and 1921, c. 18, 40 Stat. 1122; c. 136, 42 Stat. 291, upon sales of articles which the revenue officers regarded as "parts or accessories for" motor vehicles the sale of which is subjected to a tax by subdivisions 1 and 2 of that section. In each case the facts were found specially and judgment was given for the defendant. In all this Court granted certiorari.

We pass the details relating to protests, claim to a refund and

administrative denial of those claims, and come directly to the terms of the section under which the taxes were exacted. It provides:

"SEC. 900. That there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

"(1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

"(2) Other automobiles and motorcycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

"(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;".

The claimants do not manufacture or sell any of the vehicles enumerated in subdivisions 1 and 2, but each does manufacture and sell the article on sales of which the challenged tax was assessed and collected. These sales were all to persons other than a manufacturer or producer of any of the enumerated vehicles. In each case the question presented is whether the article sold is a "part or accessory for" such a vehicle within the meaning of subdivision 3.

Taking the three subdivisions together it is apparent that the words "parts" and "accessories" have the same meaning in all; that they comprehend articles having some relation to the enumerated motor vehicles; and that it is because of that relation that the tax is laid on their sale.

Subdivisions 1 and 2, with the introductory provision, contemplate that parts and accessories may be sold along with the vehicle by the manufacturer of the latter, and show that where this is done the tax is to be paid by the manufacturer of the vehicle. Subdivision 3, with the introductory provision, contemplates that parts and accessories may be sold separately from the vehicle by the manufacturer of the former to others than a manufacturer of the latter, as where the sale is for replacement purposes, and show that the tax on such a sale is to be paid by the manufacturer of the parts and accessories. And it is implicit in the three subdivisions, with the introductory provision, that where parts and

accessories are sold by their manufacturer to a vehicle manufacturer to be resold along with the vehicle by the latter, the sale by the former is to be tax free, while the resale by the latter, when incidental to the sale of the vehicle, is to be taxed against the latter as already indicated.

Thus the scheme of taxation embodied in these provisions centers around the motor vehicles enumerated therein. Their sale is the principal thing that is taxed, and the sale of parts and accessories "for" such vehicles is taxed because the parts and accessories are within the same field with the vehicles and used to the same ends.

The administrative regulations issued under § 900 uniformly have construed the term "part" in that section as meaning any article designed or manufactured for the special purpose of being used as, or to replace, a component part of such vehicle, and which by reason of some characteristic is not such a commercial article as ordinarily would be sold for general use, but is primarily adapted for use as a component part of such vehicle. The regulations also have construed the term "accessory" as meaning any article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.

This construction of those terms has been adhered to in the Internal Revenue Bureau for about ten years and it ought not to be disturbed now unless it be plainly wrong. We think it is not so, but is an admissible construction. Certainly it would be unreasonable to hold that articles equally adapted to a variety of uses and commonly put to such uses, one of which is use in motor vehicles, must be classified as parts or accessories for such vehicles. And it would be also unreasonable to hold that articles can be so classified only where they are adapted solely for use in motor vehicles and are exclusively so used. *Magone* v. *Weidner*, 159 U. S. 555, 559. We think the view taken in the administrative regulations is reasonable and should be upheld. It is that articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles, even though there has been some other use of the articles for which they are not so well adapted.

It remains to apply that view to the cases in hand.

In No. 127 the claimant was taxed on the sale of storage batteries to divers dealers. In the petition it was alleged that bat-

teries of the type sold were not primarily adapted for use in motor vehicles, but on the contrary were, and long had been, used for various other purposes particularly named. This was a material issue; but the court, although finding that the batteries were, and had been for several years, used for the purposes alleged, made no finding as to whether they were primarily adapted for use in motor vehicles or were equally adapted for the other uses named. There should have been a definite finding on the matter. The other findings are such that, in view of that omission, the judgment should be reversed and the case remanded for complete findings and such further proceedings as may be appropriate.

In No. 275 the articles sold were storage batteries. There is a special finding that the batteries were of a type specially suitable for use on automobiles as replacements and were not adapted to any other primary purpose or use. With this matter of fact so found the judgment should be affirmed.

In No. 350 the tax was on sales of gascolaters, a device used on internal combustion engines to strain dirt, water and foreign matter from the gasoline before it reaches the carburetor. The petition alleged that gascolaters were not parts or accessories of motor vehicles but commercial articles sold for general use and used on various internal combustion engines other than those in motor vehicles. This was a material issue. The findings make no definite response to it but leave the matter where conflicting inferences may be drawn respecting it. Because of this, the judgment should be reversed and the case remanded for definite and complete findings and such further proceedings as may be appropriate.

In No. 351 the articles sold were gears, flexible shafts and flexible housings, all being replacement parts for speedometers used on motor vehicles. It is conceded that speedometers are accessories; but it is insisted that parts of a speedometer cannot be such. We think they can. The finding is that these parts were specially designed, manufactured and sold for use on automobiles and are not adapted to any other purpose or use. It is not questioned that when sold they had reached such a stage of manufacture that they were adapted for ready replacement and use; so it is not as if the process of manufacture were not complete. A speedometer consists of distinct and separate parts, and we perceive no reason why one or more of these when manufactured and sold for the purpose

shown by the finding should not take the same classification as speedometers. The judgment should be affirmed.

In No. 352 the tax was laid on sales of bars, brackets and fittings for use as replacement parts for bumpers on automobiles. They were designed, manufactured and sold for such use and were not adapted for any other. It is said that while bumpers are accessories these parts cannot be so regarded. We think they are on the same plane as the parts of speedometers just dealt with. The judgment should be affirmed.

In Nos. 127 and 350 judgments reversed and cases remanded for further findings.

In Nos. 275, 351 and 352 judgments affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.